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In the

Supreme Court of the United States

Yong-Qian Sun, Petitioner

v.

Board of Trustees of the University of Illinois, et al, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Writ of Certiorari

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Questions Presented for Review

1. An adverse employment decision impacting a plaintiff employee is made by a unit manager who recommended the decision and a higher-ranking manager who reviewed and approved the recommendation. Whether, and in what circumstances, the illicit animus of the unit manager may be considered a motivating factor in the final decision and be imputed to the employer under federal anti-discrimination laws.

2. Whether the entry of a default judgment against a defendant as a discovery sanction pursuant to Federal Rule of Civil Procedure 37 for violating two discovery orders is so harsh a sanction that it may be vacated without good cause.

Statutory Provisions Involved

Section 703 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m), which provides:

> "... an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Federal Rules of Civil Procedure Involved

Rule 37(b)(2)(C), Fed. R. Civ. P., which states:

> "If a party ... fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make an order ... rendering a judgment by default against the disobedient party;"

Rule 55(c), Fed. R. Civ. P., which states:

> "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Orders and Opinions Below

The order of the District Court rendering a default judgment against the Respondents (Appendix A at App. A2) is unpublished.

The order and opinion of the District Court vacating the default judgment (Appendix B at App. A9) is published at 229 F.R.D. 584 (C.D. Ill. 2005).

The order and opinion of the District Court granting summary judgment to Respondents (Appendix C at App. A28) is unpublished but unofficially reported at 2006 WL 1149545 (C.D. Ill., May 2, 2006).

The opinion of the Court of Appeals affirming the District Court's decisions (Appendix D at App. A75) is published at 473 F.3d 799 (7th Cir. 2007).

Parties

The parties to this Petition are Petitioner-Plaintiff Yong-Qian Sun, proceeding *pro se*, and Respondents-Defendants Board of Trustees of the University of Illinois, Richard Herman, David E. Daniel, Robert Averback, John H. Weaver, Ian M. Robertson, and Joseph E. Greene.

Jurisdiction

The judgment of the court of appeals was entered on January 16, 2007 and the petition for a rehearing *en banc* was denied on February 14, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Corporate Disclosure Statement

Petitioner Yong-Qian Sun is a private person and not a corporation.

There is no parent or publicly held company owning 10% or more of Respondents Board of Trustees of the University of Illinois, Richard Herman, David E. Daniel, Robert Averback, John H. Weaver, Ian M. Robertson, and Joseph E. Greene.

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STATEMENT OF THE CASE

Facts

This Petition for a Writ of Certiorari arises from a District Court's order vacating a default judgment that had been entered against Respondents as a discovery sanction pursuant to Fed. R. Civ. P.37(b)(2)(C), and a subsequent order granting summary judgment to Respondents in a claim by Petitioner of discriminatory and retaliatory termination of employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000-3 and 42 U.S.C. Section 1983. The Court of Appeals affirmed both orders.

Synopsis

In October 2002, Respondent John Waver, a Head of a Department at the University of Illinois, recommended to Respondents David Daniel and Richard Herman, who were respectively a College Dean and the University's Provost, that Petitioner be terminated. Daniel and Herman approved the recommendation in November 2002. Petitioner then filed an internal grievance. He alleged that the termination recommendation was the result of retaliation against him by Weaver for refusing Weaver's request for the Teacher of the Year Award and that the Department had unfairly manipulated his promotion dossier. The internal grievance, which lasted a year long and involved other personnel of the University, was not successful, ending in November 2003 when Provost Herman reaffirmed the decision to terminate Petitioner. Petitioner filed a discrimination law suit in January 2004 alleging a similar set of facts as his internal grievance. A default judgment was entered against Respondents as a discovery sanction in June 2005 and later vacated in August 2005. Summary judgment was granted to Respondents in May 2006.

The Termination Recommendation

Petitioner Yong-Qian Sun, a native of China, was an Assistant Professor in the Department of Materials Science and Engineering at the University of Illinois. In October 2002, the Department was to decide whether to grant Petitioner promotion to associate professor with tenure. (App. A76.)

In April of 2002, Petitioner was one of two members of a panel to select the Teacher of the Year Award winner for the Department, having won the award himself the previous year. Prior to the selection, Department Head Weaver had lobbied Petitioner for the award. On April 9, 2002, on hearing that he had not been selected, Weaver was extremely upset with Petitioner and dramatically changed his attitude towards Petitioner. (App. A30, A76.) In May 2002, Weaver withdrew the compensation of Petitioner for teaching on-line courses by instituting a new Departmental policy that adversely affected Petitioner only. (App. A76)

In May of 2002, Respondent Robert Averback, the Chairman of the Department's Promotion and Tenure Committee, asked Petitioner for a list of names of people whom Petitioner would prefer not be asked to provide external reference letters on Petitioner. (App. 79.) Petitioner orally identified three names, including Michael Mills and Patrick Veyssiere, as non-impartial stemming from his recent rejection of their manuscripts submitted for publication. Averback nevertheless asked Mills and Veyssiere to provide confidential reference letters on Petitioner. Some members of the Department considered the reference letter from Mills weak. (App. A34.) Averback stated that he had to ask Mills and Veyssiere to provide reference letters on Petitioner because this practice was not forbidden by the University and he was having difficulty finding appropriate people to evaluate Petitioner. (App. A79.)

On May 15, 2002, Respondent Joseph Greene, who was one of the four members of the Department's Promotion and Tenure Committee and considered by many an influential and powerful figure in the Department, stated at a meeting that he would never have a Chinese student in his research group and would not even interview them. Greene testified that this was a throw away remark to express his frustration at the prolonged discussion about graduate student recruitment. (App. A77.)

In the days prior to the voting by the Promotion and Tenure Committee on Petitioner in October 2002, Weaver approached several members of the Department to make negative comments on Petitioner and to discourage them from voting. (App. A81.) Pascal Bellon testified that he felt pressured when Weaver came to him to make negative comments about Petitioner but still supported Petitioner. (App. A36, 37.) James Economy also testified to Weaver's attempts to influence him to vote against Petitioner and also stated that Weaver was not successful because he supported Petitioner. (App. A37, 81.) No witnesses testified to yielding to Weaver's influence in deciding against Petitioner. (App. A69.)

On October 2, 2002, the Promotion and Tenure Committee voted unanimously (4:0) to terminate Petitioner. Soon afterwards, Weaver informed Petitioner that he would recommend termination and denial of promotion. (App. A81).

Prior to and including the vote on Petitioner, the Promotion and Tenure Committee (PTC) of the Department had voted on nineteen promotion candidates in the Department. Seventeen are Caucasian. Two, including Petitioner, are natives of China. The PTC voted unanimously in favor of all of the seventeen Caucasian candidates and voted unanimously against both of the two Chinese candidates. The other Chinese candidate, after a successful internal grievance, was granted promotion, but not by the Department. (App. A97.)

The Multiple Decision-Makers Involved in Petitioner's Internal Grievance

Soon after receiving the notice of termination from Provost Herman in November 2002, Petitioner started an internal grievance process. The grievance process, lasting over a year, ended on November 7, 2003 when Provost Herman reaffirmed his earlier decision to terminate Petitioner. (App. A90.) In his internal grievance, Petitioner alleged that the termination recommendation was the result of Department Head Weaver retaliating against him for refusing Weaver's request for the Teacher of the Year Award, the unfair manipulation of his promotion dossier by the Department's Promotion and Tenure Committee, and the retaliation against him for filing internal grievances. (App. A82-85.)

Petitioner first filed a grievance with the College Grievance Committee in November 2002, alleging retaliation by Weaver and unfair manipulation of his dossier by the Promotion and Tenure Committee. He requested that his work performance be evaluated anew by an independent committee. The Grievance Committee found no merits to the allegations and denied Petitioner's request for a new evaluation. Based on this finding, on January 24, 2003 Dean Daniel reaffirmed his earlier decision. (App. A84.)

Petitioner then filed a grievance with the University's Faculty Advisory Committee, repeating the same allegations. The Faculty Advisory Committee investigated and found that Weaver had inappropriately tried to influence the decision to terminate Petitioner and that the Petitioner was treated unfairly than other candidates in the Department. The Faculty Advisory Committee recommended to Provost Herman and Dean Daniel that the decision to terminate Petitioner be evaluated independently by a different committee. (App. A 43-44, A84-85.)

Instead of seeking advice from an independent committee, Provost Herman at this time asked the Department to reconsider it earlier decision. On July 10, 2003, the Department, now under Interim Head Respondent Robertson after Weaver's resignation, reaffirmed its earlier recommendation. (App. A85-86.) At the same time, Dean Daniel asked a four-person College Promotion Committee, two of whose members including the chairman also sat on the College Grievance Committee, to consider the Petitioner's work performance. This committee found a number of deficiencies about Petitioner and also affirmed the Department's recommendation. (App. A87.) Lance Cooper, the Chairman of the College Promotion Committee who had earlier chaired the College Grievance Committee, swore that he had "utter confidence" in his own ability in not letting his earlier decision affect his second decision. (App. A49.) On July 21, 2003, Provost Herman again wrote to Petitioner to repeat the decision to terminate Petitioner. (App. A89.)

In the midst of Petitioner's internal grievance about Weaver and the Department's Promotion and Tenure Committee, Weaver resigned and Respondent Robertson was named Interim Head on March 20, 2003. A few days after his appointment, on April 1, 2003, Robertson asked Petitioner to resign from the panel to select the Teacher of the Year because Petitioner had attacked the Department by filing internal grievances. Petitioner refused to resign and was ultimately allowed to participate in the award selection. (App. A43.)

In August of 2003, finding that the affirmation of the termination decision was based on recommendations made by the same individuals that had made the earlier recommendations, the Faculty Advisory Committee again asked Provost Herman to appoint an independent committee to consider the termination decision. (App. A89.) On October 14, 2003, Herman appointed an *ad hoc* committee that consisted of

four faculty members of the University who had not participated in making the earlier recommendation. (App. A89.)

Lynn Barnett-Morris, chairwoman of the Faculty Advisory Committee, testified that Herman agreed not to provide the *ad hoc* committee with any comments from Respondent Robertson in order to ensure the committee's independence. (Footnote on App. A51.) Herman denied making such an agreement. *Id.* Herman provided the *ad hoc* committee with a letter from Robertson that highlighted deficiencies in Petitioner's performance in the areas of invitations to international conferences, organizations of conferences and the raising of research money. (App. A47 ,49.)

The *ad hoc* committee voted 3:1 in favor of terminating Petitioner. Charles Tucker, who was a member of the *ad hoc* committee and voted for termination, testified that the committee did read and consider Department Head Robertson's letter but did not give it much weight. (App. A52, A89.) On November 7, 2003, Herman made his third and final decision to terminate Petitioner. (App. A89.)

Petitioner then complained with Herman that the record listing twenty-some research publications had been deleted from his promotion dossier that the Department provided to the *ad hoc* committee. (App. A52-53.) Respondents did not dispute that these publications were deleted, but maintained that these publications at conferences were unimportant to the termination decision. (App. A52.) Interim Department Head Robertson had earlier identified Petitioner's lack of activity at international conferences as one of the deficient areas justifying the termination recommendation. (App. A47.)

The Default Judgment

Having exhausted his internal administrative remedies, Petitioner filed suit on January 12, 2004. He alleged that Respondents discriminated and retaliated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000-3 and 42 U.S.C. Section 1983.

Discovery commenced with the Magistrate Judge issuing a Rule 16 discovery order on June 7, 2004. When Respondents failed to comply with Petitioner's written discovery requests due on November 21, 2004, the Magistrate Judge held a telephone conference on December 16, 2004 and orally ordered the Respondents to comply with Petitioner's requests. (App. A4.)

On January 21, 2005, Petitioner filed his first motion to compel compliance after Respondents failed to comply with the oral order. On March 1, 2005, the Magistrate Judge granted the motion and ordered in writing full compliance by March 18 and sanctioned Respondents with fees and costs. He warned the Respondents: "Defendants are reminded that they face increasingly severe sanctions for failing to respond to discovery." (App. A4-5.)

On April 1, 2005, Plaintiff filed his second motion to compel compliance. On April 26, 2005, the Magistrate Judge entered another order, ordering Respondents to comply within seven days. (App. A5-6.) He again sanctioned Respondents with fees and costs. The Magistrate Judge warned the Respondents that they faced the possibility of default judgment:

> "[i]f Defendants do not participate in the discovery process, their pleadings will be stricken and Plaintiff will be free to request that they be defaulted." (App. A6.)

On May 4, 2005, Petitioner filed his third motion for sanctions and for default judgment. Defendants did not file a response to this motion. (App. A6.) On June 3, 2005, the Magistrate Judge granted the motion, and recommended striking the Respondents's pleadings and defaulting the Respondents. (App. A2.)

On June 17, 2005, Respondents filed an objection to the Magistrate Judge's default recommendation, arguing that the delay in complying with discovery had been due to personnel changes at the University and loss of associates at the defense law firm. (App. A3.)

On June 23, 2005, the District Court denied Respondents' objection and adopted the Magistrate Judge's default recommendation. (App. A8.) The District Court noted that "[Respondents] were provided a clear warning regarding the consequences of failing to comply with Judge Bernthal's orders to fully comply with Plaintiff's requests for written discovery. Defendants' belated excuses for their failure to comply (which were never raised in a motion for extension of time or a response to a motion to compel) do not begin to justify the lengthy delays in this case, especially in the face of direct orders from Judge Bernthal and in the face of repeated warnings regarding the consequences of inaction. This court further concludes that the belated excuses certainly do not justify the fact that, even now, Defendants have still not fully complied." (App. A6-7.) The District Court concluded:

> "Under these circumstances, this court concludes that Defendants have displayed willfulness, bad faith or fault and a default judgment is the only adequate sanction." (App. A7-8.)

Decisions of the District Court

On July 1, 2005, Respondents filed a motion to vacate the default judgment. (App. A10.) They presented a set of reasons for the prior violations of discovery orders, mainly that the individual Respondents had long provided the written discovery to their attorneys, but one of the attorneys, due to his mental and physical illnesses, failed to comply with court orders. (App. A12-14.)

Petitioner, in opposing the motion on July 6, 2005, showed that Respondents personally violated court orders. He pointed to the dates of printing left on some of the documents which indicated that these documents were printed after the default judgment had been entered and hence could not have been long provided to their attorneys as claimed. (App. A15-16.)

On August 8, 2005, the District Court granted Respondents' motion to vacate the default. The District Court found that the individual Respondents themselves, as well as their two attorneys, were responsible for violating the court's orders that led to the entry of default. (App. A21.) It also concluded that there was no good cause for the default, stating: "Defendants have not convinced this court that the entry of default was not warranted in this case." (App. A23.)

The District Court, however, vacated the default merely to have the case decided on merits, stating:

> "As much as this court finds all of [Respondents'] arguments lacking in merit, it does have an interest in having cases decided on the merits and concludes that sanctions lesser than default may be appropriate in this case. Accordingly, Defendants' Motion to Vacate

> Default Judgment (#47) is GRANTED." (App. A23-24.)

On May 2, 2005, the District Court granted summary judgement on all claims to all of the respondents. (App. A28.) The core of the District Court's reasoning is that, on both the discriminatory and retaliatory termination claims, the recommenders of the decision to terminate Petitioner had no influence on the final decision made by Provost Herman.

On the claim of the discriminatory termination, the District Court first dismissed the significance of the Department's record of voting unanimously for all of the seventeen Caucasian candidates and unanimously against both of the two Chinese candidates. It stated:

> "This evidence cannot be considered "statistical" evidence that similarly situated employees outside the protected class received systematically better treatment." (App. A57.)

The District Court also dismissed Promotion and Tenure Committee member Greene's remark that he would never have a Chinese student in his group as insignificant because "Greene did not make the decision ... The final decision was made by Herman." (App. A57.)

On the matter of retaliatory termination for exercising free speech, the District Court reasoned in the same vein. It concluded that Weaver, the Department Head who made the recommendation to terminate Petitioner, had no influence on the decision to terminate Petitioner because "there is no evidence that anyone was so influenced." (App. A68.) It stated that the scenario of Weaver's recommendation influencing other decision makers "is simply and entirely implausible." (App. A69.)

The District Court further dismissed the possibility that the letter to the *ad hoc* committee from the Interim Department Head Robertson that highlighted the weaknesses of the Petitioner's work performance could have influenced the committee. It explained: "Obviously, the *ad hoc* committee had to review something. If the reasons Robertson gave were inadequate, or not based upon the facts set out in the dossier, the *ad hoc* committee, whose members were senior scholars agreed upon by Plaintiff, was uniquely qualified to recognize those problems." (App. A60.)

Decisions of the Seventh Circuit

On the matter of default judgment, the Seventh Circuit affirmed the vacatur of the default judgment. It first stated that there must be good cause before a default judgment may be vacated, noting that such a showing is mandatory. (App. A94.) The court did not dispute Petitioner's contention that in this case there was no good cause for Respondents' conduct that led to the default. Instead, it found that the conduct was not serious enough to warrant the entry of default. While noting that Respondents violated multiple discovery orders, the Seventh Circuit held that violations of court orders alone are insufficient for measuring the seriousness of the conduct for entering a default judgment, but the length of the delay caused and the magnitude of the monetary sanctions ignored should also be considered:

> "Although [defense] counsel should have promptly complied with the court's orders to answer outstanding interrogatories, their delay was not so extreme as to warrant an entry of default. Likewise, although the district court tried to use less drastic sanctions by twice imposing monetary penalties, it brought out the heavy artillery too soon. Instead of

> entering a default, punishing the defendants and giving the plaintiff a windfall, the district court should have imposed increased monetary sanctions against the attorneys who had caused the discovery delays." (App. A95.)

The Seventh Circuit also affirmed the order granting summary judgment to Respondents. In a departure from the reasoning of the District Court, the Seventh Circuit found that the Department's voting record - its unanimous votes for all of the seventeen Caucasian candidates and against both of the two Chinese candidates - was probative of intentional discrimination on the part of the Department's Promotion and Tenure Committee (PTC). (App. A97.) The Seventh Circuit also found that the remark by PTC member Joseph Greene that he would never have a Chinese student in his group would also be probative of a discriminatory animus on the part of Greene. (App. A97-98.)

The Seventh Circuit however concluded that any illicit animus shown by the voting record and Greene's remark was immaterial because the Promotion and Tenure Committee did not make the final decision:

> "If the PTC had made the final decision in Sun's case, its voting record coupled with the discriminatory remarks of one of its four members may have created a genuine issue of material fact." (App. A98.)

The Seventh Circuit similarly concluded that the Department Head Weaver, who made the initial recommendation to terminate Petitioner, also had no influence over the final termination decision. It explained:

> "Although a reasonable jury could conclude

> that Weaver influenced some faculty members, the numerous subsequent reviews by independent decision makers once again break any causal chain between any retaliatory conduct and the ultimate decision not to promote Sun. Regardless of Weaver's alleged improper behavior, committee after committee found Sun's qualifications unworthy of tenure and promotion. Therefore, it cannot be said that Sun's speech motivated the decision." (App. A103.)

The crux of the Seventh Circuit analysis in affirming the summary judgment is that, even though there is evidence of illicit animus on the part of those who made the recommendation to terminate Petitioner - the Department Head and the Department's PTC - the illicit animus cannot be imputed to the employer because the final decision is sufficiently insulated by the additional reviews conducted in the wake of Petitioner's internal grievance.

Issues Raised

Section 703 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m) provides:

> "... an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Within the meaning of this statutory language, whether, and in what circumstances, may the illicit animus of the recommender of an adverse employment decision - the

Department Head and the PTC in this case - be considered "a motivating factor" in the final decision made and reviewed by other higher-ranking managers of the same employer? Is the Seventh Circuit reliance on the existence of multiple reviews of the recommendation for insulating the illicit animus of the recommender from the final decision maker in conformance with the language of "a motivating factor" in 42 U.S.C. § 2000e-2(m)?

Federal Rule of Civil Procedure 37(b)(2)(C) states:

> "If a party ... fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make an order ... rendering a judgment by default against the disobedient party;"

How should the seriousness of discovery abuses be measured for the purpose of entering and vacating a default judgment pursuant to Federal Rules of Civil Procedure 37 and 55? Is the entry of default for violating multiple discovery orders so harsh a sanction that it may be subsequently vacated without good cause? Besides violations of court orders, must the length of the delay caused and the magnitude of monetary sanctions ignored by the disobedient party be used to gage the seriousness of discovery abuses? What is the meaning of the phrase "good cause" in Fed. R. Civ. P. 55(c)? Does it mean good cause for the disobedient party's conduct that led to the default, or good cause on the part of the court to lift the default?

Reasons for Granting the Petition

Question 1

I. The Circuits Are Split over the Standard for Imputing Subordinate Animus

On the issue of imputation of subordinate animus to the final decision maker, the circuit courts of appeals are divided in two groups. These two will be referred to as the "influence group" and the "cause group."

In the "influence group" are the Second, Third, Fifth and Ninth Circuits. This group of circuits apply a less strict standard for imputing the illicit animus of a subordinate manager to the final decision maker than the "cause group." Here a complaining plaintiff employee is merely required to demonstrate that the recommending manager participates in making the decision or has some influence over the final decision maker in order to prevail on a claim of subordinate bias liability. In *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), the Fifth Circuit held:

> "Summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action."

The reasoning of the "influence group" is amply demonstrated by the decisions in this group in the context of employment decisions by universities impacting the granting of tenure to professors who complained of discrimination. The Second Circuit held in *Roebuck v. Drexel University*, 852 F.2d 715, 727 (3d. Cir. 1988):

> "Discrimination at any stage of the academic hiring or promotion process may infect the ultimate employment decision .... A plaintiff in a university discrimination case need not prove intentional discrimination at every stage of the decision-making process; impermissible bias at any point may be sufficient to sustain liability."

The Ninth Circuit adopted the approach of the Second Circuit, holding in *Lam v. University of Hawaii*, 164 F.3d 1186, 1188 (9th Cir. 1999), also a case involving termination and denial of tenure:

> "[I]n a failure-to-grant-tenure case, even though each successive evaluator of a professor's candidacy performed a *de novo* review, it was permissible for the jury to consider and conclude that an evaluation based on discrimination made early in the process infected the ultimate decision, because that evaluation was available to future evaluators and possibly influenced the decision making process."

Similarly, the Third Circuit reasoned that the existence of influence or participation is sufficient to impute subordinate animus, stating: "[u]nder our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate." *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265 (3d Cir. 2001).

In the Ninth Circuit, the mere involvement of the subordinate manager in making the decision is sufficient for the purpose of imputing any illicit animus to the final decision

maker, stating: "Even if a manager was not the ultimate decision-maker, that manager's retaliatory motive may be imputed to the company if the manager was involved in the hiring decision" *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136 (9th Cir. 2001).

The circuits in the "cause group", on the other hand, require that the subordinate manager with an illicit animus be the cause of the final adverse employment decision. In *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), the Fourth Circuit held that to impute the illicit animus the recommending manager must possess the authority of a principal decision maker:

> "To survive summary judgment, an aggrieved employee who rests a discrimination claim .. upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decision-maker of the employer."

Also in the "cause group" is the Eleventh Circuit in which liability may be imposed where the biased subordinate actually "is the decision-maker, and the titular 'decision-maker' is a mere conduit for the harasser's discriminatory animus." *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998).

The recommender of an adverse employment is the initiator of the decision, one who sets in motion the decision that impacts the complaining employee, one who imparts a starting moment to the decision. In the absence of the recommendation, the same final decision may not have been

made. The Seventh Circuit's reliance in this case on the existence of multiple reviews conducted in the wake of an internal grievance for insulating the illicit animus of the recommenders from the final decision to terminate Petitioner places it squarely in the "cause group" in conflict with the "influence group" of circuits.

II. The Seventh Circuit's Decision is in Conflict with *Price Waterhouse v Hopkins*

In his appeal to the Seventh Circuit, Petitioner cited *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) in arguing that the illicit animus shown by the recommenders in this case should be imputed to the final decision maker. The Seventh Circuit's decision in this case is in conflict with *Price Waterhouse* to which it did not make a reference in its opinion in this case.

In *Price Waterhouse*, Hopkins was denied partnership in a large firm. Senior partners of the firm provided comments on Hopkins to the Admissions Committee, which then made a recommendation to the Policy Board which made the final decision to deny Hopkins partnership. Hopkins alleged that the final decision resulted from sex discrimination, and pointed to the sexually stereotypical views held by some of the firm's partners who made the recommendation. This Court found that the partners, though outside the decision-making chain, influenced the final decision through their comments. In dicta, this Court stated:

> "A negative comment, even when made in the context of a generally favorable review, nevertheless may influence the decision-maker to think less highly of the candidate." (490 U.S. at 257, 109 S. Ct. at 1794, 104 L. Ed. 2d 268.)

The Department Heads and the Promotion and Tenure Committee in this case are clearly as influential as the firm partners in *Price Waterhouse*. The Seventh Circuit in its opinion made no reference to *Price Waterhouse*. Its reliance on the existence of multiple reviewers of the recommendation for insulating the illicit animus from the final decision is in conflict with *Price Waterhouse*.

III. The Seventh Circuit's Reliance on Multiple Reviews for Insulating Subordinate Animus Creates a Conflict with the Law Requiring that Internal Administrative Remedies be Exhausted

In an employer with a multi-leveled or hierarchical management structure - such as universities, large hospitals, municipal, state and federal governments - an employment decision typically involves multiple decision makers. For example, a typical university in ascending management superiority has Departments, Schools, Colleges, Campuses with decision-makers at each of the levels. In such employers, higher level decision-makers typically rely on information and recommendations provided to them by subordinate managers in making employment decisions affecting the numerous employees under them.

Before an adverse employment decision may be considered a final decision to be contested in a federal court, a plaintiff employee must first exhaust the internal administrative remedies. This means the employee must ask for reconsideration of the decision by all decision-makers in the employer who may potentially change the decision before he is permitted to file a lawsuit to contest the decision. For example, in *Okruhlik v. University of Arkansas*, 395 F.3d 872 (8th Cir. 2005), a jury verdict in favor of a university professor alleging discriminatory termination and denial of tenure was overturned because the plaintiff in that case only

appealed the termination decision to the Chancellor of the campus, but not to the President of the University. The Eighth Circuit reasoned that, because the President might have reached a different decision than the Chancellor if Okruhlik had appealed to him, the decision to terminate Okruhlik could not be considered a final decision.

Exhaustion of internal administrative remedies required by law inevitably leads to the participation of multiple administrators and multiple reviews in a multi-decision-maker employer. The existence of multiple administrative reviews affirming an adverse employment recommendation cannot be used as a reason for insulating the final decision from the discriminatory animus of the recommenders of the decision without evaluating the weight of the initial recommendation, the degree of independence of the reviewers, the degree of autonomy given to the units in hierarchical employers, and the degree of organizational loyalty within the employer.

Large or bureaucratic employers also tend to provide multiple channels for handling employee grievances. There may be grievance committees at each of the administrative levels, plus local EEO officers and special advisors to the administrators. In the present case, there were grievance committees at the Department, College and Campus levels. In seeking internal redress of a grievance, an aggrieved employee must first ask a lower grievance committee to reach a conclusion on his complaint before the higher level committee hears the case. Petitioner in this case filed grievances with Departmental, College and Campus grievance committees, leading to three more reviews replied on by the District Court and the Seventh Circuit in separating the recommenders from the final decision-maker. Evidently, the more diligently an aggrieved employee seeks internal redress, the more the administrators that will be involved in the

decision.

The existence and number of these internal grievance reviews cannot be used to insulate discriminatory animus of the initiators of an adverse employment decision from the final decision without adequately assessing the force carried by the initial recommendation, the independence of these reviews, and the organizational loyalty within the employer. Otherwise it means the more strenuously an aggrieved employee contests an adverse employment decision by filing internal grievances, the more the employee dooms his or her own lawsuit by diluting the illicit animus of the initial recommender.

If the Seventh Circuit's reliance on multiple reviews to insulate subordinate animus is left uncorrected, it only means impasse for employees who are discriminated against: If the aggrieved employee does not file an internal grievance, she is damned for failing to exhaust administrative remedies. If she does file such a grievance, she is also damned by creating layers of review to insulate the culpable recommender of the decision from the final decision.

Question 2

I. The Seventh Circuit is in Conflict with Other Circuits Over the Meaning of Good Cause for Vacating a Default Judgment

The Seventh Circuit's decision in this case on the issue of default judgement creates a conflict with other circuits on the vacatur of a default judgment entered as a discovery sanction. The conflict appears in two respects, namely the meaning of the phrase "good cause" in Fed. R. Civ. P. 55(c) and how the seriousness of discovery abuses should be measured.

The Federal Rule of Civil Procedure 55(c) provides that a previously entered default order or default judgment may be vacated only if there is "good cause" shown:

> "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

The Second, Sixth, Eleventh and DC Circuits have held that good cause refers to such cause for the disobedient party's conduct that led to the default judgment, and that it is an abuse of discretion to vacate a default judgement in the absence of such good cause.

The Sixth Circuit interprets "good cause" to mean mistake, inadvertent surprise or excusable neglect that caused the entry of default. In reinstating a default judgment that had been vacated in the district court, the Sixth Circuit held in *Weiss v. St. Paul Fire &Marine Insurance Co.*, 283 F.3d 790, 794 (6 Cir. 2002):

> "A party seeking to vacate a default judgment under Rule 60(b)(1) must demonstrate first and foremost that the default did not result from his culpable conduct. That burden may be carried only by meeting the requirements of Rule 60(b)(1), that is, by demonstrating that his default was the product of mistake, inadvertence, surprise, or excusable neglect."

In *Gucci America, Inc. v. Gold Center Jewelry*, 158 F.3d 631 (2d Cir. 1998), the Second Circuit reinstated a default judgment vacated by the district court, finding that it had abused its discretion in vacating the previously entered default because the defendants had not shown good cause for

the initial entry of default. The defendants' conduct was willful, which was sufficient to sustain the default.

In *Manufacturer's Industrial Relations Ass'n v. East Akron Casting Co.*, 58 F.3d 204, 209-10 (6 Cir. 1995), the Sixth Circuit reinstated a default judgment vacated by the District Court because the defendant had not carried its burden of demonstrating that the default was the product of mistake, inadvertence, surprise, or excusable neglect, and the District Court's vacatur of the default was therefore an abuse of discretion.

In *African Methodist Episcopal Church, Inc. v. Ward,* 185 F.3d 1201 (11 Cir. 1999), the Eleventh Circuit reinstated a default judgment vacated by the district court, finding that the district court had abused its discretion in vacating the default for the sole reason of having the case decided on merits. It explained:

> "The threat of default (and default judgment) is the court's primary means of compelling defendants in civil cases to appear before the court. If these defaults could be put aside without cause, the threat of default would be meaningless, and courts would lose much of their power to compel participation by civil defendants." (183 F.3d at 1203.)

In *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995), the D.C. Circuit reinstated a default judgment erroneously vacated by the District Court when the defendant failed to explain its delay in answering the complaint, finding that the District Court's action was an abuse of discretion.

In a further split with the other circuits, the Seventh Circuit held that the mere violations of a court's discovery

orders are not sufficient for measuring the seriousness of a discovery abuses, but that the magnitude of the monetary sanctions ignored and the length of the delays caused must also be considered. (App. A95.) The Eighth Circuit in *Forsythe v. Hales*, 255 F.3d 487, 490-491 (8th Cir. 2001) held that the violation of a single discovery order without monetary sanction was sufficient to sustain default judgment as a discovery sanction.

II. The Seventh Circuit's Ruling in this Case is in Conflict with This Court's Decision in *National Hockey League*

In *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976), a decision of this Court that Petitioner relied on in his appeal but the Seventh Circuit did not even make a reference to, this Court reinstated a district court's dismissal of a case for the violation of a single discovery order by the plaintiff, reversing the court of appeals that vacated the dismissal. In it, this Court held:

> "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other

> discovery orders of other district courts. Under the circumstances of this case, we hold that the District Judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities." (427 U.S. at 643, 96 S. Ct. at 2781, 49 L. Ed. 2d 747.)

The Federal Rule of Civil Procedure 37 that permits default judgment or dismissal as a sanction for violating court's discovery orders - much like disqualification in a game of baseball for throwing sand at the umpire - would be toothless if a court is permitted to vacate a default judgment without good cause.

III. The Seventh Circuit Applied a More Lenient Standard Towards Defendants than Plaintiffs in Rendering Default or Dismissal as a Discovery Sanction

The Seventh Circuit also appears to have applied a more lenient standard towards defendants than to plaintiffs on the matter of discovery sanctions. In *Williams v. Chicago Board of Education* 155 F.3d 853, 858 (7th Cir. 1998), the Seventh Circuit affirmed the dismissal of a lawsuit as a discovery sanction against the plaintiff in that case for violating a single discovery order. In *In re: Thomas Consolidated Industries, Inc.*, 456 F.3d 719 (7th Cir. 2006), the plaintiff violated one discovery order by repeating non-responsive answers to written interrogatories. The Seventh Circuit again affirmed the dismissal by the District Court, noting that incomplete and non-responsive answers amounted to failure to respond.

The Respondents' repeated violations of District Court's discovery orders are far more egregious than those of the plaintiffs in the above cases. Yet the Seventh Circuit concluded that the entry of default for the Respondents' multiple violations was so harsh that it may be vacated without a showing of good cause for the willful conduct that led to the entry of default.

The notion of equal justice under the law would be meaningless if courts do not treat complaining plaintiff employees and defendant employers equally in rendering dismissals and default judgments as a sanction.

Conclusions

For all of the reasons set forth above, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

YONG-QIAN SUN,
Plaintiff,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, RICHARD HERMAN, DAVID E. DANIEL, ROBERT AVERBACK, JOHN H. WEAVER, IAN M. ROBERTSON, AND JOSEPH E. GREENE,
Defendants.

Case No. 03-2221

ORDER

A Report and Recommendation (#37) was filed by Magistrate Judge David G. Bernthal in the above cause on June 3, 2005. Judge Bernthal recommended that Plaintiff's Third Motion for Sanctions (#34) be GRANTED. Accordingly, Judge Bernthal recommended that the pleadings of all Defendants be stricken, the Defendants be defaulted, and Plaintiff be allowed to proceed. Judge Bernthal also recommended that Plaintiff be awarded his fees and costs related to the bringing of the motion. In making this recommendation, Judge Bernthal noted that, "[a]ccording to the uncontested allegations of the motion, no defendant has fully responded to the outstanding interrogatories and requests for production." Judge Bernthal stated:

> The history of Defendants' failure to participate in the discovery phase of this litigation is well documented. Initially, Plaintiff attempted to resolve matters without the necessity of a motion to compel. He asked the Court for a status conference. That request was granted and the Court attempted to resolve matters informally. When that failed, a series of motions to compel followed. In granting the motions, the Court has warned Defendants of the serious consequences that could result from a failure to abide by the Court's Orders. The Court's previous Orders and admonitions have been ineffective. As a result, nearly one and one-half years following the filing of the complaint, Plaintiff is still struggling to obtain discovery responses. The Court cannot allow this.

On June 17, 2005, Defendants filed their Objections to Report and Recommendation (#38). Defendants acknowledged that their responses to discovery "have been late." However, Defendants argued that Judge Bernthal's recommendation was too harsh because "there have been unusual and extenuating circumstances" and Defendants have produced responses to requests to produce and answers to interrogatories. Defendants listed, as extenuating circumstances, changes at the University, including the resignation of the President and consequent search for a replacement, the death of Associate Provost David Swanson, the appointment of Defendant Richard Herman as Interim Chancellor, the search for a new Chancellor and Provost, and the resignation of Defendant David Daniel as Dean of the College of Engineering. Defendants also stated that two associates left Defendants' law firm unexpectedly in January 2005. Defendants stated that they had provided much written discovery to Plaintiff and indicated that responses were now complete. Defendants stated that they "have been late with

written discovery but they have not been in bad faith and they have not behaved contumaciously." Defendants cited no case law authority for any of their arguments.

On June 21, 2005, Plaintiff filed a Memorandum of Law in Opposition to Defendants' Objection to Magistrate's Report and Recommendation (#39). Plaintiff argued that the sanction of a default judgment is warranted in this case, and cited case law in support of this argument. Plaintiff noted that Defendants' responses to written discovery were due November 21, 2004. Plaintiffs argued that, prior to Judge Bernthal's Report and Recommendation, Defendants had responded to less than half of the written discovery requests and a number of Defendants had made no response to these written requests. Plaintiff explained in detail why none of the "extenuating circumstances" listed by Defendants could possibly justify the failure to comply with written discovery for seven months past the deadline. Plaintiff also stated that Defendants still have not complied with Judge Bernthal's Orders to fully comply with written discovery requests. Plaintiff listed the items which still have not been received. Plaintiff noted that in the seven months prior to his default recommendation on June 3, 2005, Judge Bernthal issued progressively severe warnings, orders, and sanctions. The court records fully document this assertion.

The record in this case shows that Judge Bernthal held telephone status conferences on October 1, 2004, and December 16, 2004, during which the status of discovery was discussed. Plaintiff filed his first Motion to Compel Compliance with Discovery (#27) on January 21, 2005. Defendants filed their Response (#28) on January 31, 2005. In their Response, Defendants stated that the documents requested would be produced by February 4, 2005, and that the process of answering interrogatories was "close to being completed." A hearing was held on March 1, 2005. After hearing argument from the parties, Judge Bernthal granted Plaintiff's Motion to

Compel. Judge Bernthal ordered compliance by March 18, 2005, and awarded Plaintiff his attorney fees and costs related to the motion. Plaintiff submitted an Affidavit (#29) setting out his attorney fees and costs. On April 14, 2005, Judge Bernthal entered a written Order (#31) which ordered Defendants to pay Plaintiff $362.00 in attorney fees and costs. In this Order, Judge Bernthal stated, "Defendants are reminded that they face increasingly severe sanctions for failing to respond to discovery."

On April 1, 2005, Plaintiff filed his Second Motion for Sanctions and to Compel Compliance with Written Discovery (#30). Plaintiff stated that Defendants had not complied with Judge Bernthal's Order to fully comply with requests for written discovery by March 18, 2005. Plaintiff stated that "[d]epositions of the parties still cannot go forward until responses to written discovery requests have been received, and these continue to be significantly delayed because of Defendants' failure to comply with the Court's order to answer written discovery by March 18, 2005." Defendants did not file a Response to this Motion. On April 26, 2005, Judge Bernthal entered an Order (#32). Judge Bernthal noted that Plaintiff's assertion that Defendants had not complied with the Court's Order was not contradicted. Judge Bernthal stated:

> The Court has been very clear in its admonition to Defendants regarding the possible consequences of not complying with the orders of the Court. Both Plaintiff's counsel and the Court have shown patience. That patience should not be mistaken for tolerance of unacceptable behavior.

Judge Bernthal therefore granted Plaintiff's Second Motion to Compel and ordered Defendants to fully respond to Plaintiff's discovery requests within seven (7) days of the date of the

Order. Judge Bernthal stated, "[i]f Defendants do not participate in the discovery process, their pleadings will be stricken and Plaintiff will be free to request that they be defaulted." Judge Bernthal also granted Plaintiff's request for an award of attorney fees and costs associated with bringing the motion. On May 4, 2005, Plaintiff submitted an Affidavit (#33) regarding his attorney fees and costs. On June 3, 2005, Judge Bernthal awarded attorney fees and costs in the amount of $272.00.

On May 4, 2005, Plaintiff filed his Third Motion for Sanctions (#34). Plaintiff stated that, despite Judge Bernthal's April 26, 2005, Order which ordered Defendants to fully respond to Plaintiff's discovery requests within seven days, not one of the Defendants had fully complied. Plaintiff stated that "Defendants' refusal to comply with the Court's order to fully comply with written discovery requests within 7 days of April 26, 2005, without explanation is willful, intentional, contumacious, and unjustified conduct." Plaintiff asked the court to strike the pleadings of all Defendants, to enter default judgment in favor of Plaintiff and against all Defendants, and to award additional attorney fees and expenses incurred in bringing the motion, and to set the case for trial on the issues of damages and other remedies only. Defendants did not file a response to this motion.

This court has carefully reviewed the record in this case, Judge Bernthal's Report and Recommendation, Defendants' Objections, and Plaintiff's Memorandum of Law in Opposition to Defendants' Objections. Following this careful and de novo review, this court agrees with the reasoning of Judge Bernthal in his Report and Recommendation. This court notes that Defendants were provided a clear warning regarding the consequences of failing to comply with Judge Bernthal's orders to fully comply with Plaintiff's requests for written discovery. Defendants' belated excuses for their failure to comply (which

were never raised in a motion for extension of time or a response to a motion to compel) do not begin to justify the lengthy delays in this case, especially in the face of direct orders from Judge Bernthal and in the face of repeated warnings regarding the consequences of inaction. This court further concludes that the belated excuses certainly do not justify the fact that, even now, Defendants have still not fully complied. This court notes that it has no reason to doubt Plaintiff's statement that some written discovery has not been received. Accordingly, this court must agree with Judge Bernthal and Plaintiff that less drastic sanctions have failed and the only proper course in this case is to impose the sanctions recommended by Judge Bernthal.

This court recognizes that "an award of sanctions must be proportionate to the circumstances surrounding the failure to comply with discovery." *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993). However, "a default judgment may be awarded if it is a sanction proportional to the discovery failure." *Crown Life Ins. Co.*, 995 F.2d at 1383; see also *In re Golant*, 239 F.3d 931, 936-38 (7th Cir. 2001). Accordingly, default is warranted where the failure to comply with discovery orders was willful and demonstrated contumacious conduct and where less severe sanctions failed. *Crown Life Ins. Co.*, 995 F.2d at 1384. In addition, default is warranted even where numerous documents have been produced where the party failing to fully comply violates court orders and the court provides notice that failure to comply could result in judgment against him. See *Golant*, 239 F.3d at 936-37. In this case, Defendants' responses to written discovery requests were due November 21, 2004. Seven months later, Defendants still have failed to fully comply, despite court orders directing them to fully comply and despite the imposition of monetary sanctions and repeated warnings of the consequences of failing to comply, including a written warning that their pleadings could be stricken and default entered against them. Under these

circumstances, this court concludes that Defendants have displayed willfulness, bad faith or fault and a default judgment is the only adequate sanction. See *Golant*, 239 F.3d at 936-37.

IT IS THEREFORE ORDERED THAT:

(1) The Report and Recommendation (#37) is accepted by this court.

(2) Plaintiff's Third Motion for Sanctions (#34) is GRANTED. Accordingly, the pleadings of all Defendants are hereby stricken, all Defendants are defaulted, and Plaintiff is allowed to proceed.

(3) In addition, Plaintiff is awarded his fees and costs related to the bringing of the motion. In that regard, Plaintiff should, as he has done in the past, file an affidavit of fees and costs within ten (10) days of the date of this Order.

(4) This case is referred to the Magistrate Judge for further proceedings.

ENTERED this 23rd day of June, 2005

s/ Michael P. McCuskey

MICHAEL P. McCUSKEY
CHIEF U.S. DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

YONG-QIAN SUN,
Plaintiff,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, RICHARD HERMAN, DAVID E. DANIEL, ROBERT AVERBACK, JOHN H. WEAVER, IAN M. ROBERTSON, AND JOSEPH E. GREENE,
Defendants.

Case No. 03-2221

OPINION

On June 23, 2005, this court entered an Order (#40) which accepted the Report and Recommendation (#37) filed by Magistrate Judge David G. Bernthal in the above cause on June 3, 2005. This court's seven-page Order set out, in detail, Defendants'. well-documented failures to comply with their obligation to provide written discovery. This court also discussed Defendants' violations of orders entered by Judge Bernthal, violations which occurred despite Judge Bernthal's numerous explicit warnings and despite the imposition of monetary sanctions by Judge Bernthal. This court therefore GRANTED Plaintiff's Third Motion for Sanctions (#34). Accordingly, the pleadings of all Defendants were stricken, all Defendants were defaulted, and Plaintiff was allowed to

proceed. In addition, Plaintiff was awarded his fees and costs related to the bringing of the motion. Plaintiff was therefore instructed to file an affidavit of fees and costs, which he did on June 24, 2005 (#42), seeking payment of $632.00. Defendants have not filed any objection to the amount of this request. Accordingly, Defendants are hereby ordered to pay Plaintiff $632.00 in fees and costs.

On June 28, 2005, new counsel filed their appearance on behalf on Defendants. On July 1, 2005, Defendants filed a Motion to Vacate Default Judgment (#47), with attached affidavits, a Memorandum in Support (#49), and a sealed document (#48) regarding the medical condition of Michael Cornyn, one of Defendants' attorneys. On July 6, 2005, Plaintiff filed a Memorandum of Law in Opposition to Defendants' Motion to Vacate Default Judgment (#50). This court has carefully reviewed the arguments of the parties and the documents provided. Following this careful review, this court concludes that the default judgment against Defendants should be vacated. Accordingly, Defendants' Motion to Vacate Default Judgment (#50) is GRANTED. However, this court strongly agrees with Defendants that Plaintiff must be accommodated with a sanction this court feels is appropriate. Therefore, this court is imposing alternate sanctions.

On July 27, 2005, Plaintiff filed his Fourth Motion to Compel Compliance with Written Discovery Requests (#52). This Motion (#52) is GRANTED.

BACKGROUND

On January 12, 2004, Plaintiff, Yong-Qian Sun, filed his Amended Complaint (#4) in this case against Defendants Board of Trustees of the University of Illinois, Richard Herman, David E. Daniel, Robert Averback, John H. Weaver, Ian M. Robertson, and Joseph E. Greene. Plaintiff alleged employment

discrimination in violation of Title VII of the Civil Rights Act of 1964 and also claimed violations of his rights under 42 U.S.C. § 1983.

On February 17, 2004, the Board of Trustees, through their attorney Michael R. Cornyn, filed a Motion to Dismiss (#5).1 On March 19, 2004, Attorney William J. Brinkman filed an Entry of Appearance (#9) on behalf of the Board of Trustees. On April 13, 2004, Cornyn and Brinkman filed an Entry of Appearance (#11) on behalf of the individual Defendants. On June 3, 2004, a Rule 16 hearing was held before this court and Judge Bernthal. Both Cornyn and Brinkman appeared on behalf of Defendants at the Rule 16 hearing. Following the hearing, on June 7, 2004, a Discovery Order (#20) was entered by Judge Bernthal. The Discovery Order provided detailed discovery deadlines. The Order stated that all discovery was to be completed by July 15, 2005, and that the deadline for filing case dispositive motions was August 15, 2005. This case was scheduled for a final pretrial conference before this court on December 22, 2005, at 10:00 a.m. and for a jury trial on January 9, 2006, at 8:30 a.m.

FN. 1 This motion, and a subsequent motion to dismiss, were granted in part and denied in part by this court.

As noted, there were numerous problems with Defendants providing written discovery, which culminated in this court's Order (#40) which defaulted all Defendants. On July 1, 2005, Defendants filed a Motion to Vacate Default Judgment (#47).

On July 21, 2005, the parties filed a Joint Motion to Extend Discovery Deadlines (#51). In their Joint Motion, the parties stated that they recognized that this court had not yet ruled on Defendant's Motion to Vacate Default. The parties stated that "however the Court rules on the Motion to Vacate,

additional discovery will be required so that both parties will be able to present evidence on whatever issues will ultimately be presented to the jury."

A telephone status conference was held regarding the Joint Motion on July 22, 2005, before this court and Judge Bernthal. After hearing from counsel, this court granted the motion. Accordingly, the deadline for completing discovery was extended to September 30, 2005. The deadline for filing case dispositive motions was extended to October 28, 2005. The case was scheduled for a final pretrial conference on February 3, 2006, at 1:30 p.m. and for jury trial on February 21, 2006, at 9:00 a.m. At the hearing, Plaintiff's counsel stated that he still had not received some requested documents from Defendants. Defendants' counsel stated objections had been made to providing some of the requested documents. This court reminded Defendants' counsel that no timely objections were made in this case, so that any objections have been waived. It is this court's recollection that Plaintiff's counsel was instructed that, if the requested documents were not received, Plaintiff should file a Motion to Compel.

I. MOTION TO VACATE DEFAULT

A. ARGUMENTS PRESENTED

1. Defendants' innocence of misconduct

In their Memorandum, Defendants first argue that this court should vacate the default judgment against Defendants because Defendants were personally innocent of any misconduct in this case. Defendants argue that the failures in this case were, instead, the result of Cornyn's medical conditions. Defendants argue that "Cornyn's recent conduct is out of character with his behavior in the course of a distinguished career, much of it in federal court." In support of

this argument, Defendants presented the affidavits of Michael Cornyn, William J. Brinkman, and Mark Henss. Defendants also supplied a "Discovery Chronology" which purported to show that all written discovery has now been provided.

In his affidavit, dated July 1, 2005, Attorney Cornyn stated that he was one of the attorneys charged with representing all Defendants in this lawsuit. Cornyn further stated that he was the person in charge of coordinating and finalizing the discovery compliance of all Defendants to the Interrogatories and Requests to Produce which were forwarded to Defendants by Plaintiff's counsel. He stated that, in conjunction with that responsibility, he contacted all of the Defendants with respect to discovery in this case. Cornyn stated that, "[w]ithout exception, all Defendants were fully cooperative with me in providing the discovery I requested and the answers to interrogatories." Cornyn stated that he did not, at any time, advise Defendants of the existence of the three motions to compel filed by Plaintiff or of Judge Bernthal's orders. Cornyn stated that "Defendants were never aware of the orders entered by the Court and never apprehended that they were in violation or potential violation of any such orders at any time prior to June 23, 2005." Cornyn stated that he did advise Mark Henss of the Office of University Counsel that the first Motion to Compel was filed, an order entered and sanctions granted. Cornyn stated that he informed Henss "that the problem would be worked out quickly and written discovery was nearly completed." Cornyn stated that he did not, at any time, inform Henss of the second or third motions to compel, or orders relating to those motions. Cornyn also stated:

> I have recently been diagnosed as suffering from two serious conditions, and the doctor who provided said diagnosis has advised me that he believes that these conditions lasted for at least six months. A report from Dr. David Whitehill

> confirming and explaining that diagnosis has been forwarded to Plaintiff's counsel. A motion to file that report under seal has been filed. I ask that said report be kept under seal and not made available to the public.
> I believe that the conditions from which I was suffering interfered with my ability to properly manage the defense of this case for each of the Defendants, to their detriment.

As noted, Defendants filed, under seal, a letter from Dr. David L. Whitehill related to Cornyn's medical condition. Dr. Whitehill stated that evaluations of Cornyn "have resulted in two significant medical diagnoses" and that Cornyn "has decided to take a short-term medical leave of absence to help in addressing these issues."

In his affidavit, dated June 30, 2005, Attorney Brinkman stated that he is counsel of record in this case but that "Cornyn had performed virtually all of the work on this file and was so doing exclusively during 2005, until June 24, 2005." Brinkman stated that he was aware of the first motion to compel but was assured by Cornyn that the order was being complied with. Brinkman stated that, until June 24, 2005, he had "no personal knowledge" of the second or third motion to compel, Judge Bernthal's Report and Recommendation or this court's Order accepting it. Brinkman stated that he did not discuss any of these matters with Defendants, Mark Henss or anyone at the University of Illinois Office of University Counsel.

Mark Henss is an attorney employed by the University of Illinois Office of University Counsel. In his affidavit, dated June 30, 2005, Henss stated that he is the assigned in-house counsel who is the contact person at the University for this case. Henss stated that it was his understanding that Cornyn was the attorney actively representing Defendants in all

discovery issues in this matter. Henss stated that he was the in-house counsel to whom Cornyn would report any significant developments. He stated that he and Cornyn agreed that Cornyn should contact all Defendants directly to facilitate their compliance with discovery in this case, except for Chancellor Herman, whose contact with Cornyn was facilitated by Henss. Henss corroborated Cornyn's affidavit and stated that Cornyn advised him, regarding the first Motion to Compel, that the problems would be worked out quickly and that the written discovery was nearly completed. Henss stated that he was not advised by Cornyn, or anyone else in Cornyn's office, of the filing of the second or third motion to compel and was unaware that no response was made to these motions by Cornyn on behalf of Defendants. Henss stated that he was not aware of Judge Bernthal's Report and Recommendation or this court's Order accepting it, until June 24, 2005. Henss stated that, had he been aware of Cornyn's failure to respond to the second and third motions to compel, he "would have immediately taken steps to see to it that those failures were addressed and eliminated." Henss stated "[t]he University does not take these cases lightly. . . . They are never ignored."

In his Memorandum of Law in Opposition to Defendants' Motion to Vacate Default Judgment (#50), Plaintiff argues that the record shows that Defendants themselves violated discovery orders and did not provide documents even after the default judgment recommendation. Plaintiff contends that Defendants' argument that they "were personally innocent of any misconduct" would be true if all of the Defendants indeed provided all the written materials to their attorneys before the first motion to compel was filed and Cornyn simply did not pass the documents and answers to interrogatories on to counsel for Plaintiff. Plaintiff contends that the record shows that this was not the case. Plaintiff notes that a number of documents provided by Defendants were printed by Defendants' equipment and the date generated

automatically by the printing machine shows that they were printed on May 17, 2005, May 18, 2005, and June 6, 2005. Plaintiff argues that these late-printed documents, some of which were printed after Judge Bernthal made his default recommendation, show that "some of the defendants did not even print the requested documents, let alone provide them to Attorney Cornyn, until well after the court orders were issued" and even after Judge Bernthal made the recommendation for default judgment. Plaintiff further points out that, if Cornyn's statement that Defendants were never aware of the orders entered by the court was true, the printing of these documents "means that six months after the discovery due date some of the defendants suddenly realized on their own that the requested documents needed to be submitted and voluntarily started to print the documents at about the same time without being warned or being told that they had been committing a serious discovery violation." Plaintiff argues that Cornyn's affidavit statement simply strains credibility. Plaintiff further stated that, as of the date of his Memorandum, some documents requested had still not been provided. Plaintiff argued that Defendants have been properly sanctioned for their own failure to participate in discovery and to obey court orders, as well as for the failure of their attorneys.

Plaintiff further argued that, even if only Cornyn was responsible for the violations of the court orders, Defendants are bound by his conduct, noting that the Seventh Circuit has stated:

> [A] client is bound by his chosen agent's deeds, whether it be negligence, gross negligence, or even wilful conduct. 'Holding the client responsible for the lawyer's deeds ensures that both clients and lawyers take care to comply. If the lawyer's neglect protected the client from ill consequences, neglect would become all too

common.'

United States v. 8136 S. Dobson Street, Chicago, Ill., 125 F.3d 1076, 1084 (7th Cir. 1997) (internal citation omitted).

Plaintiff also takes issue with Defendants' assertion that Cornyn's behavior in this case was out of character for him, noting that Cornyn has in the past handled written discovery requests in a manner similar to his handling of written discovery requests in this case, which also led to the entry of a default judgment against his client. Plaintiff then referred to the case of *Robinson v. City of Champaign*, Case No. 00-CV-2315, also filed in this court. Plaintiff noted that, in the Robinson case, Cornyn represented Defendant James Peterson from November 2000 to December 2002. In that case, default judgment was entered against Peterson when Peterson failed to provide answers to written interrogatories six months after their due date. In Robinson, also, Cornyn filed a motion to vacate the default and argued that his client was unaware of the motions, orders and sanctions because the client could not be located. This court did not find Cornyn's explanation credible and denied the motion to vacate.

In addition, Plaintiff takes issue with the medical explanation provided for Cornyn's behavior. Plaintiff notes that Dr. Whitehill is an associate professor at the University, and his statement regarding Cornyn's medical condition is beneficial to his employer, Defendant Board of Trustees, and his superior, Defendant Chancellor Herman. Plaintiff also points out that Dr. Whitehill's letter is extremely short on details, such as whether he had seen Cornyn before and the nature of his appointment to provide the assessment of Cornyn. Plaintiff further notes that Dr. Whitehill practices in the area of "family practice" and may not be particularly suitable to evaluate Cornyn's "two serious conditions" which are outside his area of specialty. Plaintiff also stated:

> Attorney Cornyn conducted a six-hour deposition of Plaintiff on June 20, 2005, a few days before Dr. Whitehill's assessment of his physical and mental conditions. The deposition was intense and focused. Plaintiff and his Counsel saw no sign that Mr. Cornyn did not or could not conduct the deposition as aggressively or as long as they had anticipated.

Plaintiff also argues that Cornyn's mental and physical conditions, even if confirmed and serious, are not a valid reason for reversing a discovery sanction. Plaintiff relies on *Tango Music v. DeadQuick Music,* 348 F.3d 244 (7th Cir. 2003). In Tango Music, the Seventh Circuit rejected the plaintiff's argument that it should be excused for its failure to prosecute the case because of its attorney's depression. Tango Music, 348 F.3d at 247. The Seventh Circuit noted that the plaintiff was not a "hapless individual" and had "to take responsibility for the actions of its agents, including the lawyers whom it hires." Tango Music, 348 F.3d at 247.

Finally, Plaintiff argues that Attorney Brinkman waived his defense on the basis of lack of knowledge about the motions, orders, and sanctions filed in this case by registering with the Electronic Case Filing System of the United States District Court of the Central District of Illinois. Plaintiff notes that Brinkman was a recipient by electronic means of each and every one of the motions, orders, docket entries, and reports and recommendations generated in this case since February 8, 2005.

2. Court should have given direct notice to Defendants

Defendants, remarkably, argue that the sanctions imposed in this case are really the fault of the court, not Defendants. They contend that this court should have given Defendants direct notice of the failures of their counsel, while

conceding that "[o]bviously, this is not something which is required of the Court."

In his Memorandum in Opposition, Plaintiff argues that this contention by Defendants is entirely and completely without merit. Plaintiff notes that the cases cited by Defendants for this remarkable proposition are completely inapposite because those cases involved "unsophisticated clients," unlike the professors and high-level university administrators who are Defendants in this case. See Dunphy v. McKee, 134 F.3d 1297 (7th Cir. 1998); Ball v. City of Chicago, 2 F.3d 752 (7th Cir. 1993). Plaintiff notes that, in Dunphy, the neglected client was a prison inmate who made frequent, sometimes nearly monthly, inquiries with the court about the progress of his case. Dunphy, 134 F.3d at 1299. Plaintiff notes that, in comparison, "Defendants in this case and their internal legal counsel presented no evidence as to whether they even inquired with their own attorneys, let alone the Court, about the progress of the lawsuit after they became aware of the first sanction." Plaintiff further points out that the docket in this case, including the full text of motions and orders, is available to the public on the world-wide-web. Plaintiff argues that if prison-inmate Dunphy could write frequent letters to the court from his prison cell, "surely it is much less of an effort for Defendants in this case and their legal staff to log on to the Court's web page and find out if their attorneys are doing the job they were retained to perform." Plaintiff further notes that the Seventh Circuit stated in Ball that a "judge is not obligated to treat lawyers like children." Ball, 2 F.3d at 755. Plaintiff argues that the "University's own lawyers should have become vigilant after they knew about the first sanction and order, should have acknowledged their own failure to track this lawsuit after they became aware of the first warning sign, and should certainly not attempt to shift the blame to others, including the Court, for not notifying them of something that they knew had happened to them once already."

3. Defendants have a meritorious defense to Plaintiff's claim

Defendants also argue that the default should be vacated because they have a meritorious defense to Plaintiff's claim and "are entitled to have a judicial determination" of the merits of Plaintiff's claim against them. Defendants argue that a default judgment is not merely an issue of money, because Plaintiff is seeking reinstatement, and note that Defendants' "conduct in their capacity as employees of the University of Illinois is at issue in this litigation." In support of these arguments, Defendants attached the affidavit of Defendant Ian M. Robertson, dated July 1, 2005, who baldly asserts that "Plaintiff's national origin, race, or membership in any other protected class did not affect the procedures by which Plaintiff's application for tenure was processed."

In response, Plaintiff argues that the default should not be vacated because Defendants' failure to participate in discovery has brought substantial prejudice to Plaintiff. Plaintiff argues that Defendants have caused a total of about 12 months' delay to the discovery phase of this case. Plaintiff notes that, so far, only Plaintiff's deposition has been taken in this case and that some written discovery has still not been provided to Plaintiff. Plaintiff argues that, if the default is vacated, it may well prove impossible for the parties to try the case as scheduled in January 2006, causing substantial prejudice to Plaintiff.

4. Court should have considered alternate sanctions rather than default

Defendants argue that this court should have considered the possibility of sanctioning the attorney in this case, Cornyn, rather than Defendants. However, Defendants then state that, given what is now known about Cornyn's medical condition, sanctions against Cornyn would not be appropriate. Defendants

also contend that they were penalized too harshly for the conduct of their counsel. They argue that, under the circumstances here, the entry of default was too harsh a sanction and this court should have imposed a lesser sanction than default. Notably, Defendants have not made any suggestions as to what an appropriate "lesser" sanction might be in this case. Defendants ask that this court vacate the default and impose "such sanctions as the Court deems appropriate." Defendants ask that this court allow the case to proceed "accommodating the Plaintiff with whatever sanction the Court feels is appropriate under the circumstances."

As noted, Plaintiff disagrees that a sanction other than default would be appropriate in this case and argues that Defendants' lengthy delays have caused substantial prejudice to Plaintiff, prejudice making the default remedy the only appropriate remedy in this case.

B. ANALYSIS

This court is not persuaded by Defendants' first two arguments. This is not a case where Defendants are totally innocent of any misconduct. This court agrees with Plaintiff that the record does not support a conclusion that Defendants fully complied with written discovery in a timely manner and Comyn simply did not provide the responses to Plaintiff. The record clearly shows that Defendants did not provide documents and answers to interrogatories until months and months after the deadline. Interestingly, Henss stated in his affidavit that he was responsible for communicating with Comyn regarding Defendant Herman's compliance with discovery in this case. The "Discovery Chronology" provided by Defendants shows that Herman did not provide Answers to Interrogatories until May 4, 2005, and did not complete formal document production until June 29, 2005. This record does not support blamelessness on the part of Defendants.

As far as Cornyn's culpability, this court has reservations regarding whether his failures in this case were totally the result of medical conditions which, according to Dr. Whitehill, adversely affected Cornyn's ability to function in his job as an attorney and which "affect [sic] may have gone back as far as six months."

This court is, of course, well aware of Cornyn's conduct in the *Robinson* case and agrees with Plaintiff that the "manner in which Attorney Cornyn handled the written discovery in [Robinson] bears a remarkable resemblance to the way he handled the written discovery requests in the instant case." The court notes that, in Robinson, Cornyn claimed for months that he was unable to locate Peterson (even though Peterson was receiving a monthly pension check from the City of Champaign, also represented by Cornyn). Cornyn, miraculously, was able to locate Peterson approximately one week before the jury trial was scheduled in that case. This court notes that the default in Robinson was entered in May 2002 and this court denied Cornyn's motion to vacate the default judgment on June 13, 2002. Whatever problems Cornyn has, medical or otherwise, which caused his conduct in the Robinson case and in this case have, obviously, been in existence for much longer than six months. This court also agrees with Plaintiff that "clients may be held responsible for the acts and omissions of their chosen counsel." *In re Telesphere Communications, Inc.*, 177 F.3d 612, 617 (7th Cir. 1999); see also *Easley v. Kirmsee*, 382 F.3d 693, 698 (7th Cir. 2004) ("attorney inattentiveness to litigation is not excusable, no matter what the resulting consequences the attorney's somnolent behavior may have on a litigant"); *Tango Music*, 348 F.3d at 247 ("If the lawyer's neglect protected the client from ill consequences, neglect would become far too common."); *Harrington v. City of Chicago*, 2004 WL 2973750, at *4 (N.D. Ill. 2004) ("clients are held accountable for the acts and omissions of their attorneys"). "[T]he sins of the agent can be

visited upon the principal." *Ball*, 2 F.3d at 756; see also *Firstar Bank NA v. Goldman*, 2004 WL 1212099, at *4 (N.D. Ill. 2004) (noting that Defendants voluntarily chose this particular attorney to represent them in this matter).

This court also agrees with Plaintiff that Attorney Brinkman's claims of lack of knowledge ring hollow. The record shows that Brinkman was receiving electronic notification of everything docketed in this case, including the motions to compel, the orders of the court and Judge Bernthal's Report and Recommendation. Brinkman's claim that he "had no personal knowledge" of these matters evinces a shocking inattention to a case in which he was designated lead counsel along with Cornyn.

This court additionally notes that it finds completely outrageous Defendants' argument that it was really the court's fault for not informing Defendants directly of Cornyn's failures. As aptly noted by Plaintiff, any of the Defendants, and certainly their in-house counsel, could easily check court documents at any time. Defendants obviously had enough knowledge to know they should be concerned and their failure to adequately follow this litigation cannot be condoned by this court.

This court additionally notes that it has no mechanism to "directly inform" parties, especially sophisticated parties such as Defendants, who are represented by counsel. If in-house counsel Henss wants direct notification from this court, he will need to enter his appearance as counsel of record.

In short, Defendants have not convinced this court that the entry of default was not warranted in this case. However, as much as this court finds all of these arguments lacking in merit, it does have an interest in having cases decided on the merits and concludes that sanctions lesser than default may be appropriate in this case. Accordingly, Defendants' Motion to

Vacate Default Judgment (#47) is GRANTED. As noted, Defendants have provided no guidance regarding alternative sanctions. After careful consideration, this court has concluded that the following sanctions are warranted and will be imposed in this case.

First, this court agrees with Plaintiff that Defendants have seriously delayed discovery in this case, to the prejudice of Plaintiff. A discovery deadline of July 15, 2005, was set in this case by Judge Bernthal on June 7, 2004. On July 22, 2005, this deadline was extended by this court to September 30, 2005. This court concludes that Defendants should not be allowed to fail to comply with discovery requests and then proceed with discovery after the discovery deadline has passed. Consequently, the extended discovery deadline, September 30, 2005, will be enforced as to all Defendants. No extensions requested by Defendants will be allowed. In addition, this court will not further extend the deadline for filing dispositive motions of October 28, 2005, as to Defendants.

This court notes that it would be unfair to Plaintiff to allow Defendants' delays to inhibit Plaintiff from obtaining the discovery he needs in this case. Therefore, this court directs Defendants to cooperate with discovery and Plaintiff's taking of depositions so that Plaintiff's discovery may be completed before the extended deadline. However, Plaintiff may seek additional time if that becomes necessary. As far as the attorneys in this case, this court concludes that sanctions against both Cornyn and Brinkman are warranted. This court now orders that Cornyn is prohibited from acting as lead counsel in any case in this court for a minimum of one year, until further order of this court, so that all of his representation will be supervised by another attorney or attorneys. This sanction will go into effect following Cornyn's short-term medical leave of absence. This court also notes that Plaintiff has requested an additional award of fees and expenses incurred in defending

this Motion.

This court concludes that this is a reasonable request, considering that Plaintiff has incurred these attorney fees and expenses through no fault of his own. This court further concludes that the discovery "mess" in this case is at least largely attributable to Cornyn's inaction and Brinkman's inattention to this case. Therefore, this court concludes that these additional fees and expenses will be assessed against Cornyn and Brinkman, personally.

II. FOURTH MOTION TO COMPEL

On July 27, 2005, Plaintiff filed his Fourth Motion to Compel Compliance with Written Discovery Requests (#52). Plaintiff detailed various items that Defendants have still not provided in response to written discovery requests. Plaintiff sought an order compelling Defendants to respond fully to the written discovery requests and for an award of reasonable attorney fees and expenses arising from the preparation of the Motion.

On August 2, 2005, Defendants filed their Response to Plaintiff's Fourth Motion to Compel (#54). Defendants stated that their present counsel has "in every respect cooperated in every way with discovery requests in this matter." Defendants therefore argued that the filing of the Fourth Motion to Compel was completely and totally unnecessary. However, Defendants then go on to acknowledge that various documents have not yet been produced but are "being gathered." Defendants attempt to excuse this delay by stating that objections had been made to the production of some of these documents, and Defendants were not informed until the hearing on July 22, 2005, that these objections were not timely. Defendants also recounted difficulties in responding to interrogatories on behalf of one of the Defendants who is retired and lives out of state. This court

notes that Defendants were ordered to completely comply with all written discovery requests on more than one occasion. This court is simply astounded that Defendants' new counsel apparently believed Defendants could nevertheless withhold documents and information.

This court additionally notes that Defendants have represented to this court that all written discovery had been provided, a statement which Defendants have now implicitly conceded is not true. Based upon the history of this case, and at this very late date, this court is not interested in hearing Defendants' excuses for failing to comply. This court also notes that Defendants, in their Response, have taken issue with Plaintiff's failure to consult with Defendants' new counsel before filing his Motion to Compel. This court concludes that, in this case, where compliance has previously been ordered on more than one occasion, and sanctions for non-compliance have been imposed, the time for requiring personal consultation has long since passed. Defendants need to comply, completely and immediately.

For the reasons stated, Plaintiff's Fourth Motion to Compel (#52) is GRANTED.

IT IS THEREFORE ORDERED THAT:
(1) Defendants are hereby ordered to pay Plaintiff $632.00 in fees and costs.
(2) Defendants' Motion to Vacate Default Judgment (#47) is GRANTED. Accordingly, this court reinstates Defendants' pleadings and vacates the entry of default against Defendants.
(3) This court imposes alternative sanctions against Defendants, and their attorneys, as follows:
(A) The extended discovery deadline, September 30, 2005, will be enforced as to all Defendants. No additional extension will be allowed as to Defendants, for any reason;
(B) The dispositive motion deadline of October 28, 2005, will

not be extended for Defendants;

(C) Attorney Cornyn is prohibited from acting as lead counsel in any case in this court for a minimum of one year, until further order of this court, so that all of his representation will be supervised by another attorney or attorneys, this sanction to go into effect following Cornyn's short-term medical leave of absence; and

(D) Plaintiff is awarded his fees and costs incurred in responding to Defendants' Motion to Vacate. In that regard, Plaintiff should, as he has done in the past, file an affidavit of fees and costs within ten (10) days of the date of this Order. These fees and costs will be assessed against Cornyn and Brinkman, personally.

(4) Plaintiff's Fourth Motion to Compel (#52) is GRANTED. Defendants are again ordered to immediately comply with all outstanding written discovery requests by providing complete answers to all interrogatories and by producing all existing documents responsive to the requests to produce documents. Plaintiff is awarded his fees and costs incurred in filing the Motion. In that regard, Plaintiff should, as he has done in the past, file an affidavit of fees and costs within ten (10) days of the date of this Order. These costs will be assessed against Defendants.

(5) Defendants' Motion to Compel (#53) remains pending.

ENTERED this 8th day of August, 2005

s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
CHIEF U.S. DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

YONG-QIAN SUN,
Plaintiff,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, RICHARD HERMAN, DAVID E. DANIEL, ROBERT AVERBACK, JOHN H. WEAVER, IAN M. ROBERTSON, AND JOSEPH E. GREENE,
Defendants.

Case No. 03-2221

OPINION

This case is before the court for ruling on the Amended Motions for Summary Judgment filed by Defendants, Board of Trustees of the University of Illinois, Richard Herman, David E. Daniel, Robert Averback, John H. Weaver, Ian M. Robertson, and Joseph E. Greene, and related motions. Following this court's careful consideration of the arguments of the parties and the voluminous documents provided by the parties, this court rules as follows: (1) Defendants' Amended Motions for Summary Judgment (#97, #98, #99, #100, #101, #102, #103) are GRANTED; (2) Defendants' Motion to Strike Plaintiff's Affidavit (#123) is DENIED as moot; (3) Plaintiff's Motion to Strike Portions of the Reply of Defendants Greene and Board of Trustees (#125) is DENIED as moot; and (4)

Defendant Herman's Motion to Amend Reply (#127) is GRANTED. Because the Amended Motions for Summary Judgment have been granted, the Motions in Limine (#130, #131, #132, #133, #134, #135, #136, #137, #138, #139) filed by the parties are MOOT.

FACTS1

Plaintiff, Yong-Qian Sun, is of the Asian race and his national origin is the People's Republic of China. On August 21, 1997, Plaintiff was hired as an assistant professor at the University of Illinois. Plaintiff was employed in the Department of Materials Science and Engineering, which is a Department in the College of Engineering. Assistant professors are on a tenure track and are evaluated in the fifth year of their employment for promotion to associate professor with tenure. If a decision to deny promotion and tenure is made, the assistant professor is issued a notice of nonreappointment, and the professor's employment is ultimately terminated. Plaintiff was considered for tenure during the 2002-2003 academic year. At that time, Defendant John Weaver was Department Head and Defendant David Daniel was Dean of the College of Engineering. Defendants Robert Averback, Joseph Greene and Ian Robertson were tenured faculty members in the Department. Defendant Richard Herman was the Provost, or Chief Executive Officer, of the faculty for the University.

FN. 1 The facts set out in this case are taken from the Statements of Undisputed Facts provided by the parties, as well as from the documents submitted by the parties.

In 2001, Plaintiff received the Donald Burnett Teacher of the Year Award. This award was given each year to reward excellence in undergraduate teaching in the Department. The recipient received a monetary award of about $8,000 that was funded by Burnett, an alumnus of the Department. The winner

of the award was announced in College and Department publications. In April 2002, the award winner was chosen by the two previous winners, Plaintiff and Pascal Bellon, who received the award in 2000. Professors who were recent recipients of the award were not eligible to receive the award.

Plaintiff testified that Weaver had suggested to Plaintiff that he be considered for the award. However, in April 2002, Plaintiff and Bellon selected Averback as the winner of the award based upon his ranking in the Instructor and Course Evaluation System. On April 9, 2002, Plaintiff sent an e-mail to Weaver recommending that Averback be given the Burnett award. According to Plaintiff, Weaver was extremely upset with Plaintiff because Weaver was not selected for the award. Plaintiff testified that Weaver's attitude toward him changed dramatically after Weaver was not selected for the award. Prior to this time, Weaver was very positive toward Plaintiff and had even nominated Plaintiff for a prestigious research award. Plaintiff testified that, after the award winner was selected, in May 2002, Weaver informed him that he would no longer have access to income generated by his teaching of online courses. Plaintiff was the only member of the Department who taught online courses, so Weaver's decision to change the policy on online courses only affected Plaintiff. Because of Plaintiff's problems with Weaver, Plaintiff and Bellon had a discussion with Phil Geil and Ken Schweizer, who received the award in 1999 and 1998 respectively. They decided that, in the future, the winner of the Burnett award would be selected by the previous four winners of the award, rather than the previous two.

It was the primary responsibility of the Department's Promotion and Tenure Committee to prepare and collect information about tenure candidates. This responsibility consisted of obtaining certain biographical information from the candidate, choosing external evaluators and obtaining a

written evaluation from the chosen external evaluators, and compiling internal evaluations of the candidate's teaching, research, and public service. The information needed for making the tenure recommendation was compiled in a document known as a dossier.

In the spring of 2002, the members of the Department's Promotion and Tenure Committee who were involved in the preparation of materials for Plaintiff's dossier were Defendants Averback and Greene, as well as David Payne and Ken Schweizer. Averback was acting as chairman of the committee for the first time. In addition to being on the committee, Greene was also the Director of the Materials Research Laboratory (MRL) which received block funding from the United States Department of Energy which ranged from $8 to $9 million per year. As Director, Greene had budget authority over this block grant money and was considered powerful and influential by some members of the faculty because he controlled the research funding for a large number of professors in the Department. On May 15, 2002, Greene said at a faculty meeting that he would not take any Chinese graduate students and that he would not interview them. Following the meeting, Weaver asked Greene about the comment. Greene said it was a stupid remark and that, while he had personal issues with human rights abuses by the Chinese government, he had no problems dealing with Chinese people. Greene testified that this was a "throwaway remark" made to express his dissatisfaction with the length of a discussion on the Department's recruitment of international students, including those from Asia. It is undisputed that, in fact, Greene had previously accepted and worked with two Chinese graduate students.

Greene's remark resulted in an exchange of e-mails, including an e-mail from Weaver to all of the professors in the Department which stated "Friends, This is to reaffirm something that should be part of our department culture–that

we welcome people from all lands, of all backgrounds, and that we seek to provide a supportive atmosphere for them to do the best work that they can." Weaver stated that this was true for "undergraduates, graduate students, postdocs, faculty, staff, and visitors" and that this was "important." Greene responded with an e-mail which stated that "[w]e should have agreed upon departmental [guidelines] (not strict numbers!) regarding the fraction of US/foreign graduate students we admit. I suggest that a reasonable goal would be 2/3 US and 1/3 foreign with a 'maximum' of 50% foreign (emphasis in original)."

In the spring of 2002, the Department Promotion and Tenure Committee placed Averback in charge of obtaining external evaluators for Plaintiff. This task was governed to a large degree by Provost Communication No. 9, a lengthy and detailed document which set out instructions for preparing promotion papers. The document included guidelines and procedures for obtaining external evaluations. Communication No. 9 provides that letters from at least four scholars or professional specialists outside the University are required for each nominee. It also provides that the letters must be appropriate in several dimensions, including that they must be sufficient in number, from appropriately selected individuals at peer institutions, from individuals of appropriate rank, and from objective evaluators without conflicts of interest. Communication No. 9 provides that the candidate must be provided with an opportunity to nominate external evaluators but that the department must also seek letters from evaluators other than those suggested by the candidate. Communication No. 9 states that a "majority of the external evaluations should come from the department's, rather than the candidate's, nominations" and that the department should "obtain a slightly larger number of opinions" from persons not nominated by the candidate. Communication No. 9 also states that the "candidate has no privilege of vetoing external reviewers, but may indicate individuals whom he or she considers inappropriately biased."

However, the "candidate cannot reasonably request avoidance of more than one or two individuals." Communication No. 9 states that the person obtaining the external evaluations should be "selective in choosing evaluators." Communication No. 9 states that the external evaluations "are critical components of the dossier and play a major role in the decision-making process." The identity of the external evaluators is confidential and not disclosed to the tenure candidate.

On May 21, 2002, Plaintiff suggested, in writing, five external evaluators. Averback testified that he determined that three of the evaluators suggested by Plaintiff were inappropriate because they were from outside of the University's peer rank. It is undisputed that the Department is one of the highest ranked departments of its kind in the country, and the University's College of Engineering is among the highest ranked Colleges of Engineering. This fact limited the number of evaluators who could be considered appropriate based upon Communication No. 9. Averback solicited letters from the other two evaluators suggested by Plaintiff. Averback gave the names to Weaver, and Weaver signed the formal letters requesting an evaluation. One of these suggested evaluators, V. Vitek, provided an evaluation which was included in Plaintiff's dossier. The other suggested evaluator, F.R.N. Nabarro, wrote back and, in his response, included a comment very critical of a paper co-authored by Plaintiff. Averback testified that, based upon this comment and also the fact that Nabarro was located outside the United States, he determined that it would not be helpful to Plaintiff to include a letter from Nabarro.

Plaintiff provided one name, in writing, of an evaluator he did not want used, A.S. Argon. No letter was solicited from Argon. Plaintiff also orally informed Averback of additional persons he wanted Averback to avoid. Averback testified that, because of problems he encountered with obtaining a sufficient number of qualified external evaluators, he eventually

requested letters from Michael Mills and Patrick Veyssiere. Plaintiff had requested that Mills not be used as an evaluator because Plaintiff had provided a negative review of an article Mills submitted for publication. Although the review was anonymous, Plaintiff believed Mills had identified Plaintiff as the review's author. Mills was suggested as a potential external evaluator by sources inside and outside of the Department, and Averback decided to contact him about providing an evaluation. According to Plaintiff, he also asked that Veyssiere not be used, but Averback did not recall Plaintiff giving him Veyssiere's name. Averback testified that, after consultation with Bellon, he decided to contact Veyssiere about providing an evaluation. Both Mills and Veyssiere wrote evaluation letters which were included in Plaintiff's dossier. Averback obtained a total of seven external evaluation letters. While several faculty members stated that they felt the letter from Mills was somewhat weak, the record shows that the majority of faculty members who expressed an opinion stated that the external evaluation letters included in Plaintiff's dossier were good.

Before Weaver became Department Head in 2000, the four members of the Department's Promotion and Tenure Committee voted on candidates for tenure and made a recommendation to the Department Head regarding whether the candidate should be given tenure. After Weaver became Department Head, this procedure was changed so that the recommendation to the Department Head was based upon the vote of all tenured faculty in the Department. The first candidate for tenure subject to this procedure was Pascal Bellon, who was granted tenure in 2001, the year before Plaintiff was considered for tenure. In Bellon's case, the faculty met in the fall of 2001 for a vote on whether the Department Head should recommend Bellon for tenure. However, the meeting adjourned without a vote. After a period of time, the faculty met again for further discussion and a vote. Ten faculty members voted in favor of tenure, ten faculty members were

opposed to tenure, and one faculty member abstained. On September 27, 2001, Weaver wrote to Bellon and advised him that he intended to recommend that Bellon be issued a notice of nonreappointment.

Bellon appealed this decision to the faculty. During the period between the initial faculty vote and the appeal meeting, Bellon met with the faculty members individually to explain his work. In addition, Averback and Gert Ehrlich, faculty members in Bellon's area, forwarded a memo to Weaver which was circulated to the Department, in which they criticized the external evaluators. They also asserted that there were inaccuracies presented at the meetings concerning Bellon's work. Weaver determined that it was appropriate that the Department contact additional external evaluators. The additional materials obtained from those evaluators were made available to the faculty at the second meeting. Additionally, Bellon's dossier was updated and made current as of the date of the appeal meeting. This updating included some additional invitations to speak and a list of five submitted papers (not yet approved, though all were subsequently accepted). At the appeal meeting, a discussion occurred and a vote was taken. On this occasion, the faculty voted seventeen to four in favor of Bellon's tenure. On November 8, 2001, Weaver forwarded Bellon's dossier to Dean Daniel with a recommendation that he be given tenure. Following this process, Bellon was granted tenure.

In Plaintiff's case the following year, the first faculty meeting to discuss his candidacy for tenure was held on September 20, 2002. As Chairman of the Promotion and Tenure Committee, Averback presided over the meeting. This was the first such meeting that Averback presided over as Chairman. Averback began the meeting by presenting the promotion standard on an overhead transparency and by discussing the necessary qualifications for tenure. Averback then stated that

Plaintiff did not meet these standards in some areas. Weaver testified that he told the faculty that if they weren't certain about how to vote, they should vote "no." Bellon was chosen to make a presentation of Plaintiff's case. Weaver testified that Bellon was chosen because he was a supporter of Plaintiff, he was in the same field as Plaintiff, and had gone through the tenure process the year before. Bellon gave a positive presentation supportive of Plaintiff's case. At the meeting, both Weaver and Greene made remarks critical of Plaintiff. Weaver also made comments which downplayed the importance of teaching in a tenure decision.

On September 23, 2002, Plaintiff presented his colloquium. In his colloquium, Plaintiff discussed the research he had done at the University and answered questions after his presentation. Prior to the colloquium, Plaintiff met with Robertson to present a "rehearsal" of his colloquium material because Robertson was familiar with Plaintiff's work and was not going to be able to be present for Plaintiff's presentation to the faculty. Robertson urged Plaintiff to revise the colloquium to make it have more of an impact on non-experts in Plaintiff's field. Plaintiff also met with Bellon who suggested some changes. Because of these revisions, Plaintiff had to replace some of his presentation slides with handwritten notes which he used during his presentation. Weaver was critical of the use of handwritten transparencies.

After the colloquium, another faculty meeting was held on October 2, 2002. The faculty discussed Plaintiff's qualifications for tenure and then voted on whether Plaintiff should be recommended for tenure. Prior to the vote, Weaver discussed Plaintiff's candidacy with some members of the faculty and made negative comments. Bellon testified that Weaver asked him how he was going to vote and suggested that Plaintiff was not the kind of person to be stuck with for 25 years and should not be promoted. Bellon testified that he told

Weaver he had a different opinion and walked away. Bellon testified that he felt pressured by Weaver, but voted in favor of tenure for Plaintiff. James Economy, the former head of the Department, testified that Weaver approached him two to three times to make negative comments about Plaintiff and also encouraged him not to come to the meeting to vote. However, Economy testified that Weaver was not successful in influencing his vote.

Averback testified that, prior to this meeting, he called Mills to get additional information because he was not sure how to vote. This conversation occurred after Mills submitted his evaluation letter. Averback did not discuss his conversation with Mills at the meeting.

At the meeting on October 2, 2002, the faculty voted by secret ballot. The faculty ballots were counted at the meeting and found to be thirteen against tenure and six in favor. Shortly thereafter, Weaver asked for a vote of the Department Promotion and Tenure Committee. That vote was four to zero against tenure. Based upon the negative vote, Weaver wrote to Plaintiff to notify him that Weaver was going to recommend against tenure and that Plaintiff had a right to appeal.

After the Department's negative recommendation, Plaintiff asked the faculty to reconsider and prepared a written appeal document which was circulated to the faculty. Prior to the appeal meeting of the faculty, approximately 21 letters in support of Plaintiff were received from persons outside of the University, some of them written by very well-known individuals in Plaintiff's field. Weaver, after consulting with Dean Daniel, sent everyone in the Department an e-mail suggesting that the letters were not appropriate, and that he believed they should not be considered. This was because the letters were not solicited with the same guidelines that the University imposes on communications with external

evaluators. However, the letters were provided to all members of the faculty prior to the appeal meeting.

On October 16, 2002, Plaintiff asked a secretary of the Department for Burnett's telephone number. According to Plaintiff, Weaver later entered Plaintiff's office and said, "Don't fuck with people outside the University!" "Don't fuck with alumni!" "You are screwing yourself!" "Five minutes ago I thought you had a good brain to pass on to your children. I don't think so anymore!" After Weaver left the room, Plaintiff wrote a letter to Weaver setting out these statements and protesting Weaver's behavior. Weaver later admitted making some of the statements attributed to him by Plaintiff.

On October 28, 2002, Plaintiff spoke with Dean Daniel and complained that his unsuccessful bid for tenure was a result of Weaver's retaliatory activity. Plaintiff alleged to Daniel that Weaver inappropriately influenced the tenured faculty of the Department in retaliation for Plaintiff not nominating Weaver for the teaching award. Plaintiff also asked that the appeal of the negative decision be heard by a different committee. Subsequently, Dean Daniel spoke to four members of the Department, Geil, Schweizer, Averback, and Russ Jamison. All four faculty members told Daniel that Weaver's behavior was appropriate. Schweizer had suggested that Daniel speak to Jamison because Jamison was a quiet individual and perhaps someone Weaver might have influenced had he attempted to do so. Daniel also spoke to Weaver. Weaver affirmed that he did suggest to Plaintiff that the Department Head should be eligible for teaching awards. Weaver also admitted using profanity when he spoke to Plaintiff on October 16, but denied any inappropriate attempt to influence the faculty vote. On October 30, 2002, Daniel e-mailed Plaintiff and advised him that Daniel did not think Weaver behaved inappropriately relative to the promotion and tenure decision. Daniel also informed Plaintiff that "the original decision-making body is generally, if not

always, the same body that considers that appeal."

The faculty met on October 30, 2002, to reconsider their recommendation. This meeting was chaired by Weaver as Department Head. Bellon testified that, at this meeting, he presented some of the information contained in the additional letters received by the faculty. The faculty again voted by secret ballot. The ballots were counted at the meeting and found to be nine votes in favor of tenure, nine votes against, and one abstention. Weaver wrote to Plaintiff the same day and advised him that the Department intended to affirm the original decision regarding the notice of nonreappointment. Subsequently, Weaver received an e-mail from Veyssiere, who wrote to Weaver complaining about the denial of tenure to Plaintiff.

On November 5, 2002, Plaintiff wrote to Gerald J. Janusz, the chairman of the Faculty Advisory Committee, and asked the committee to consider his grievance over the denial of tenure. The Faculty Advisory Committee is made up of representatives elected from the entire faculty body. It is a campus-wide body that is advisory to the Provost and only investigates procedural matters. It is undisputed that the Faculty Advisory Committee is not qualified and does not attempt to determine whether a candidate is entitled to tenure. On November 14, 2002, Janusz appointed a subcommittee to look into the matter. The members of the subcommittee were Paul Gerding, Lynn Barnett-Morris, and Jan Novakofski.

On November 22, 2002, Plaintiff filed a grievance with the College of Engineering Grievance Committee. In this grievance, Plaintiff stated that he would like the College Grievance Committee to investigate misconduct which occurred in the evaluation of his promotion in the Department. Specifically, Plaintiff alleged that: (1) Averback asked for negative comments from external evaluators and biased the evaluators against him; (2) Weaver was prejudiced against him

because he did not nominate Weaver "for an award he did not deserve"; (3) Weaver verbally abused him and his children; (4) Weaver inappropriately influenced the committee meetings on his promotion by misrepresenting his contributions; (5) Weaver treated proxy votes discriminatorily by accepting negative votes and discarding positive votes; and (6) the same committee was improperly used to evaluate his appeal. Plaintiff's allegations regarding Averback were based upon statements supposedly made by Mills to the effect that Averback sought negative comments from him.

The Grievance Committee was composed of Lance Cooper, David Lange, Phillip Krein, Eric Loth, and Joseph Torrellas. The Grievance Committee conducted an investigation and looked into the procedures used to evaluate Plaintiff's case. The Grievance Committee did not look at Plaintiff's dossier or consider the substance of his tenure case. On December 27, 2002, the Grievance Committee issued its six-page report. The report stated: The Grievance Committee finds that while there were certain areas in which departmental procedures, as well as the Department Head's handling, of Prof. Sun's promotion case could have been improved, it is our view that there were no procedural problems that ultimately resulted in an unfair or tainted adjudication of Prof. Sun's promotion case by the faculty of the Materials Science and Engineering Department. Consequently, as we believe that the earlier recommendation of the department to not promote Prof. Sun accurately reflects the collective wish of the tenured MatSE faculty, and resulted from a decision-making process that was in all respects consistent with the guidelines outlined in Provost Communications 9 and 10, we do not recommend that Prof. Sun's promotion case be reviewed in a second appeal. In its report, the Grievance Committee discussed Plaintiff's specific allegations of misconduct. The Grievance Committee stated that it had contacted Mills by phone and "Mills denied that there had been any attempt by Prof. Averback or any other

member of the MatSE department at UIUC to solicit from him negative comments about Prof. Sun." The Grievance Committee therefore concluded that the evidence did not support the allegation that negative referee comments were solicited by Averback or any other faculty member. The Grievance Committee also concluded that Averback's "reasons for not honoring all of Prof. Sun's secondary list of requested exclusions were reasonable and in accordance with Provost Communication 9" (emphasis in original). The Grievance Committee stated that in "addition to finding no evidence that the use of Prof. Mills as an external evaluator was procedurally improper, the Grievance Committee found no indication that Prof. Sun's case was in any way disadvantaged by Mills' letter."

The Grievance Committee also stated that "while there is a perception on the part of some MatSE faculty members that Prof. Weaver was too forceful in his attempts to sway faculty voting, particularly given his role as head of the department, there is no evidence that Prof. Weaver's actions were the reason that the voting faculty of MatSE ultimately did not support the promotion of Prof. Sun in either the original or appeals votes on his case." The Grievance Committee also found no evidence that the use of the same committee to evaluate his appeal resulted in a biased review of his case. The Grievance Committee noted that this procedure is in accordance with Provost Communication 10. The Grievance Committee also concluded that the evidence showed that all absentee ballots were counted. The Grievance Committee finally discussed Plaintiff's allegations of verbal abuse by Weaver. The Grievance Committee stated, "there is evidence in this case that aspects of the 'Professionalism in the Work Place' memorandum distributed by the Dean on 9/18/02 were violated, particularly with respect to the use of disrespectful language and the display of unprofessional conduct." However, the Grievance Committee concluded that these allegations, while

considered seriously, were unrelated to Plaintiff's allegations of inappropriate procedures during his promotion process, since there was no evidence that the incidents described by Plaintiff resulted in an improper handling of Plaintiff's promotion case. The Grievance Committee noted that Weaver admitted to speaking to Plaintiff in a raised voice and to uttering a profanity during his October 16, 2002, exchange with Plaintiff. The Grievance Committee stated:

> [W]hile Prof. Weaver expressed to the Committee regret for his October 16 comments, it is clear that, coming from the Department Head in the midst of the promotion process, these comments eroded the confidence that Prof. Sun had in the integrity of his promotion process, and greatly undermined his trust in Prof. Weaver. Moreover, such comments are contrary to the guidelines put forward by the College and Campus regarding the manner in which faculty should interact with one another, and should be discouraged.

After Dean Daniel received the Grievance Committee's report, he reviewed with Weaver his expectations for professional conduct in the College of Engineering. On January 22, 2003, Weaver resigned as Department Head. Weaver remained a tenured member of the faculty and was subsequently appointed to the Donald B. Willett Professorship of Engineering.

On January 24, 2003, Dean Daniel wrote to Plaintiff. Daniel stated that, based upon the Grievance Committee's conclusion that Plaintiff's promotion case was handled fairly, he affirmed his previous request to Provost Herman that Plaintiff be issued a notice of nonreappointment. Daniel also informed Plaintiff that he had reviewed with Weaver his

expectations for professional conduct. Daniel noted that Plaintiff had already filed a grievance with the Faculty Advisory Committee, which was his next avenue of appeal.

The subcommittee of the Faculty Advisory Committee assigned to Plaintiff's case deferred its consideration of Plaintiff's appeal until the completion of the investigation by the College Grievance Committee and interviewed witnesses between March and May 2003. Weaver declined to be interviewed by the Faculty Advisory Committee.

On March 20, 2003, Robertson became Interim Head of the Department. In April 2003, Robertson met with Plaintiff and suggested that Plaintiff resign from the selection committee for the Burnett Teacher of the Year Award. Plaintiff testified that Robertson said he should resign because he had taken actions against the Department by filing complaints and had attacked the Department. Plaintiff refused to resign, stating that he believed that he could be fair in his considerations, and pointed out that there were four members of the committee so that his vote would not be determinative in any event. Robertson then agreed with Plaintiff and did not remove him from the committee. Plaintiff participated in choosing the winner of the teaching award in 2003.

On May 15, 2003, the Faculty Advisory Committee issued its six-page report to Provost Herman. The Faculty Advisory Committee stated that "[a]fter considering all of the information available to us, we unanimously reached the conclusion that Professor Sun's promotion and tenure dossier was not fairly considered" (emphasis in original). In reaching this conclusion, the Faculty Advisory Committee concluded that the "Department Head inappropriately tried to negatively influence the promotion and tenure vote on Professor Sun's dossier." However, the Committee further stated that "proof that he actually influenced a faculty member into changing

his/her positive vote to a negative one is absent." Nevertheless, the Committee concluded that there was "convincing evidence to conclude that Professor Sun's dossier did not get a fair hearing." The Committee also concluded that absentee ballots were not treated consistently at different votes on Plaintiff's tenure and that "different and more exacting procedures and standards were applied" to Plaintiff's case in comparison with Bellon's case the year before. The Committee also concluded that Plaintiff's appeal was not fairly considered because the appeals meeting was chaired by the Department Head, Weaver, and because the appeal was considered by the original voting body, all of the tenured faculty in the Department. The Committee noted that this complied with "the letter of the law" in the Provost's communication, but that the Faculty Advisory Committee had been recommending "for years" that appeals be considered by a separate body. Based upon these conclusions, the Faculty Advisory Committee recommended to Provost Herman that "a more fair and impartial evaluation of Professor Sun's promotion and tenure dossier be undertaken."

However, the Faculty Advisory Committee also found that evidence that members of the Materials Research Laboratory voted as a block and were influenced by Greene and Averback was "purely speculative." The Faculty Advisory Committee also rejected the allegation that Averback tried to negatively influence the outcome of Plaintiff's promotion and tenure case. The Committee concluded that Averback was "entitled to make negative evaluative comments about a candidate since he is a member of the faculty." The Committee noted that Averback's comments were made at an open faculty meeting and "thus there is no violation." In addition, the Faculty Advisory Committee did not agree with Plaintiff's allegation that Averback deliberately solicited letters from external evaluators who Plaintiff had previously indicated should be excluded. The Committee stated that the "solicitation of an 'excluded' individual as an evaluator is consistent with

Communication No. 9 which says that individuals cannot be excluded." The Committee further stated that Averback "provided a compelling rationale that Professor Sun's field of expertise is quite small, and given additional stipulations that reviewers have to be of peer institutions and also that several other reviewers wrote that this individual should be contacted, it was not unreasonable that he be contacted." The Committee also agreed with Averback that Plaintiff's reason for excluding this individual was "weak in comparison with the reasons for including him." The Faculty Advisory Committee further stated that Mills flatly denied that he had been contacted by anyone soliciting negative comments so that there was "no evidence to pursue this allegation any further."

After receiving the report of the Faculty Advisory Committee, Provost Herman decided that Plaintiff's case should be reconsidered. Provost Herman, Dean Daniel and Robertson agreed that, because the faculty governance structure dictated that the faculty themselves decide promotion and tenure, the faculty should determine whether they could render a fair and impartial decision. If the faculty believed that they could, they should vote. If they determined they could not, an external committee would decide the matter.

On July 8, 2003, a meeting was held and the faculty reconsidered Plaintiff for tenure. Prior to this meeting, Robertson received information from Plaintiff regarding his professional activities since October 2002. Robertson stated in his affidavit that he considered this additional information to be marginal at best, possibly because of the strain Plaintiff was under due to the appeal of the tenure decision, so his opinion was that not adding this material to Plaintiff's dossier would benefit Plaintiff. According to Plaintiff, he had a significant number of publications and accomplishments during this time which should have been added to his dossier. However, it is undisputed that all questions about Plaintiff's activities since

the previous fall were answered during the discussion leading up to the vote.

At the meeting, Robertson told the faculty that the Faculty Advisory Committee had determined that certain activities of Weaver were improper and may have tainted the decision. He also stated that it was determined by the Faculty Advisory Committee that there was no improper conduct regarding the outside evaluators. Weaver did not attend the meeting.

Following Robertson's explanation, Robertson asked the faculty to vote on a confidentiality policy under which faculty who distributed information about meetings would be excused from such meetings for one year. This policy was adopted. Robertson then polled the faculty members on the issue of whether they could fairly consider Plaintiff's application for tenure. He advised the faculty that unless a two-thirds majority believed that they could be fair, he would turn the matter over to an external committee. The faculty members voted 13 to 4 that they could render a fair and impartial decision. A new faculty member abstained from this vote.

After this vote, Bellon made a presentation and a discussion followed. The faculty then voted. The vote was eight in favor of tenure, ten against tenure and one abstention. This vote included four absentee votes. Robertson testified that he did not vote. Weaver provided a proxy vote, but Robertson did not count his vote. Robertson then asked the faculty to vote on whether they believed the matter should be referred to an outside committee. The vote was five in favor, six against and two abstentions. Following this vote, Robertson determined not to sent the matter to an external committee.

On July 10, 2003, Robertson wrote a letter to Daniel

which he forwarded with Plaintiff's dossier. In the letter, Robertson described what happened at the faculty meeting and included a paragraph which stated: While it is clear that Yong-Qian Sun is an excellent teacher and has in the past, as indicated in the letters of reference, produced high-quality work, he has not been able to establish and sustain a high-quality research program at the University of Illinois. The usual indicators of high-quality work (number of invited presentations at international and national meetings, invitations to join conference organizing committees, research funding etc.) are missing. Through the Department he has submitted 24 proposals since joining in 1998. He has also been a member of other multi-investigator proposals submitted through other institutions. Of these, he has received an [National Science Foundation (NSF)] Career award (1999), supplementary funds to the Career award from the US Department of Defense (airforce) plus matching funds from NSF, funds from the US Department of Defense (airforce), and funds through the NSF STC on Water Purification at Illinois. The total level of funding over a six-year period is $462,501, which comes to less than $80,000 per year. To put this in perspective, the average annual funding level per faculty in Materials Science and Engineering is in excess of $250,000. An important point is that Sun is primarily an experimentalist and this generally requires a high level of continuous funding to support a viable program. While total funding should not be and was not an issue, Sun continues to resubmit proposals on similar topics, he does not appear to have learned from his failure, and he has not changed his approach to seeking funds from external agencies. These are strong indicators that Sun is unlikely to "improve his or her contributions to the unit over the long period typically involved in a tenured appointment" and the unit would be "better able to improve itself by hiring anew." Based on the above, I recommend against the promotion of Yong-Qian Sun to the rank of Associate Professor with tenure.

On July 11, 2003, Dean Daniel forwarded Plaintiff's dossier to the College Promotion and Tenure Committee for review. Robertson's paragraph regarding his recommendation was included as part of the dossier. The College Promotion and Tenure Committee consisted of six members, one of whom was Weaver. Weaver and another member of the committee were not involved in the review of Plaintiff's dossier. The four remaining members were Lance Cooper and Phillip Krein, who were members of the Grievance Committee which considered Plaintiff's case, as well as Larry Bergman and Bruce Hajek. On July 16, 2003, Plaintiff complained to Dean Daniel that Cooper and Krein, who had been on the College Grievance Committee, were also on the College Promotion and Tenure Committee. Daniel testified that he wanted to see the College Promotion and Tenure Committee's report because it was the only appointed entity to evaluate promotion cases and it was nearly finished with its evaluation.

On July 17, 2003, the College Promotion and Tenure Committee sent its seven-page report to Dean Daniel. The report stated that, following the Committee's review, it concluded that the decision by the Department "to not promote Prof. Sun was 'reasonable' in the sense that it was consistent with not only the current standards and past practices established by the MatSE department, but also with the guidelines and procedures established by the Provost for promotion and tenure cases." The report then detailed the conclusions it reached following its review of Plaintiff's record and its comparison of Plaintiff's case to Bellon's case. The Committee stated that the "negative departmental votes in the Bellon case indicate to us that the Bellon case was near the borderline of what is acceptable to the MatSE faculty for promotion to associate professor with tenure" and thus "offers an important point of reference for the Sun case." The Committee concluded that: (1) there was no substantive difference in the formatting of the two dossiers; (2) the

credentials of the external evaluators for Plaintiff and for Bellon were roughly comparable, although the overall credentials of Bellon's letter writers were perhaps slightly stronger than those writing for Plaintiff's case; (3) the two cases were nearly equivalent as to classroom teaching; (4) although both cases were somewhat below average in graduate student supervision, Bellon's case was slightly stronger because he had supervised one Ph.D. student to completion and had published a larger number of journal articles with his students; (5) the quantity and quality for journal publications was roughly similar; (6) Bellon had a better record as to invited presentations, particularly those that were international in scope; (7) Bellon had a significantly better record of research funding; (8) the strength of the external evaluation letters was similar for both Plaintiff and Bellon, so the two cases were rated evenly on this point; and (9) the level of service in the two cases was comparable and satisfactory. The Committee concluded that the cases of Bellon and Plaintiff were very similar in many categories but that Bellon's case was stronger in the areas of visibility, number of students graduated, impact of recent work, and record of research funding. The Committee stated that there were no areas where Plaintiff's case was superior to Bellon's. The Committee also concluded that the process by which the faculty arrived at their decision was reasonable.

Cooper testified that, when he looked at the case as a member of the College Promotion and Tenure Committee, he had "utter confidence" in his ability to be reasonable and not let prior decisions influence him. He also testified that his experience with the Grievance Committee did not affect his consideration of the issues as a member of the College Promotion and Tenure Committee and stated that the Grievance Committee did not even look at the dossier.

After he received the report of the College Promotion

and Tenure Committee, Dean Daniel conducted his own review of Plaintiff's dossier. On July 21, 2003, Daniel sent a letter to Provost Herman which set out the procedures followed to review Plaintiff's case following the report of the Faculty Advisory Committee. Daniel then informed Herman that he conducted his own reassessment of the case and stated that, in his judgment, "this case does not meet the expectations for promotion and tenure in the College of Engineering." Daniel stated that his own recommendation was against promotion and tenure. On July 21, 2003, Herman wrote to Plaintiff and stated that he was recommending that a letter of nonreappointment be issued.

On July 28, 2003, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging discrimination based on race and national origin. Daniel and Herman were informed of the EEOC charge. On September 25, 2003, the EEOC issued its right to sue letter.

In August 2003, Janusz, the Chairman of the Faculty Advisory Committee, informed Provost Herman that two members of the College Promotion and Tenure Committee had also been members of the Grievance Committee which considered Plaintiff's appeal. Herman testified that, to err on the side of caution, he agreed to appoint an ad hoc committee at the University level. The ad hoc committee chosen by Herman was comprised of Harry Cook, Andrew Gewirth, Gene Robinson, and Charles Tucker, all of whom were senior scholars at the University. Plaintiff found the proposed group acceptable. In fact, Cook had been suggested by Plaintiff. On October 14, 2003, Herman sent a letter to each of the members of the ad hoc committee. Herman enclosed a copy of Plaintiff's dossier which included Robertson's comments regarding the Department's decision to recommend against tenure.2 Herman also enclosed additional material Plaintiff provided updating his

dossier. Herman stated that he was seeking advice concerning the substance of Plaintiff's case and asked the ad hoc committee to determine "Is the department's unfavorable recommendation justified on the merits of the case, or does the case warrant being advanced with a favorable recommendation to higher levels of review?" Herman testified that he did not provide the ad hoc committee with the additional letters received following the initial Department vote recommending denial of tenure because these letters were not gathered as part of the formal procedure.

FN. 2 Barnett-Morris, a member of the Faculty Advisory Committee who investigated Plaintiff's case, testified that Herman had agreed not to provide Robertson's comments to the ad hoc committee. Herman testified that there was no such agreement.

Charles Tucker stated in his affidavit that he is a Professor in the Department of Mechanical Industrial Engineering and is currently the Associate Head for the undergraduate program in the Department. He stated that, on October 14, 2003, he was asked by Herman to participate in the ad hoc committee to provide advice regarding Plaintiff's promotion case. Tucker stated that, as a member of the Campus Promotion and Tenure Committee for three years, he had the opportunity to review hundreds of dossiers and materials provided with respect to candidates for tenure. He stated that Herman provided him with Plaintiff's dossier, along with additional materials provided by Plaintiff updating the dossier. The ad hoc committee was advised by Herman that it had been determined that there were flaws in the process by which the initial decision on the tenure question was made. The ad hoc committee was not advised of the nature of the flaws but were just told that, due to certain perceived procedural flaws, they were being asked to review the dossier as a special ad hoc committee advising Herman. Herman did not inform the ad hoc

committee of the results of the votes taken by the Department or of the results of the review by the College Promotion and Tenure Committee.

Tucker stated that the dossier they received included the comments of Robertson, the Head of the Department. Tucker stated that these comments were read and considered but were one of several factors, and not the most important factor, in his evaluation of the dossier. Tucker stated that the discussions of the ad hoc committee "centered around the quality of the work of Professor Sun as reflected in his dossier with updates, and the traditional factors of service, teaching and research which are the bases for making determinations about tenure." Tucker stated that it was his opinion, based upon his evaluation of the dossier and the other materials provided by Plaintiff, that Plaintiff "was not deserving of tenure in the Materials Science and Engineering Department, one of the top two or three departments in the United States." Tucker stated that this "was the consensus of the committee." Tucker further stated that his decision "was based upon the standards of the Department and the qualifications of Professor Sun as set forth in his dossier as updated, and no other reason." The vote of the ad hoc committee was three to one against granting Plaintiff tenure.

On November 7, 2003, Herman wrote a letter to Plaintiff affirming the negative recommendation and recommending nonreappointment. On November 19, 2003, Plaintiff appealed to Chancellor Nancy Cantor, complaining of procedural irregularities. The Faculty Advisory Committee also wrote to Chancellor Cantor and Herman to record their continuing concerns with the procedures followed. On November 24, 2003, Herman wrote Chancellor Cantor a four-page letter regarding the "long history" of Plaintiff's case. In his letter, Herman disagreed with Plaintiff's claims and defended his decision. In December 2003, Herman was advised by Plaintiff that his list of 21 conference proceedings was not

included in the dossier that was provided to the ad hoc committee. In his affidavit, Herman stated that it was his belief that conference proceedings were not a significant part of Plaintiff's dossier and the presence or absence of the conference proceedings did not change the evaluation of the dossier. Weaver, Daniel, Cooper, Robertson, Averback and Greene all testified that conference proceedings were not a significant part of the dossier. In addition, Jian Ku Shang, Trudy Kriven and James Economy, faculty members who were very supportive of Plaintiff's tenure and told the Faculty Advisory Committee that Plaintiff was unfairly denied tenure, all testified that conference proceedings were not an important part of the dossier.3

It is undisputed that there was no discussion of the conference proceedings portion of Plaintiff's dossier, or the lack thereof, at any of the faculty meetings where Plaintiff's tenure was discussed. On December 8, 2003, Chancellor Cantor wrote to Plaintiff advising him that she had carefully considered the concerns he raised regarding the handling of his case for promotion and tenure. She stated that she found no grounds to reverse the decision previously made concerning tenure.

FN. 3 Shang is Chinese and was granted tenure in the Department in 1995.

On January 12, 2004, Plaintiff filed his Amended Complaint (#4) in this case against Defendants. Plaintiff alleged employment discrimination in violation of Title VII of the Civil Rights Act of 1964 and also claimed violations of his rights under 42 U.S.C. § 1981 and 42 U.S.C. § 1983.

ANALYSIS

MOTIONS FOR SUMMARY JUDGMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Schad v. Jones, 415 F.3d 671, 673 (7th Cir. 2005). In ruling on a motion for summary judgment, a district court has one task and one task only: to decide, based upon the evidence of record, whether there is any material dispute of fact that requires a trial. Waldridge v. American Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994). In making this determination, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing summary judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); see also Carreon v. Ill. Dept. of Human Servs., 395 F.3d 786, 790 (7th Cir. 2005). The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. Celotex Corp., 477 U.S. at 323. A genuine issue of material fact exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The mere existence of an alleged factual dispute is not sufficient to defeat a summary judgment motion, instead the nonmoving party must present definite, competent evidence to rebut the summary judgment motion. See Vukadinovich v. Bd. of Sch. Trs., 278 F.3d 693, 699 (7th Cir. 2002).

II. DISCRIMINATION

In Count I of his Amended Complaint (#4), Plaintiff has alleged that the Board of Trustees, Greene, Averback, Daniel, and Herman discriminated against him on the basis of his race and national origin, in violation of Title VII of the Civil Rights

Act of 1964.4 Specifically, Plaintiff alleged that he was denied promotion and tenure, and his employment was therefore terminated, on the basis of his race and national origin.

Defendants argue that they are entitled to summary judgment on Plaintiff's discrimination claim because Plaintiff has not presented any direct evidence of discrimination and cannot prevail under the indirect method set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).5

FN. 4 This court notes that both Plaintiff and Defendants have referred to Title VII claims against the individual Defendants. Only an employer may be liable under Title VII. See Jackson v. Int'l Bhd. of Teamsters, 2002 WL 31572544, at *7 (N.D. Ill 2002). However, Plaintiff has also alleged discrimination claims against the individual defendants under 42 U.S.C.§ 1981 and 42 U.S.C. § 1983. The standard to be applied is the same. See Blise v. Antaramian, 409 F.3d 861, 866 n.4 (7th Cir. 2005); Williams v. Seniff, 342 F.3d 774, 788 n.13 (7th Cir. 2003); Walker v. Abbott Labs., 340 F.3d 471, 474 (7th Cir. 2003).

FN. 5 Defendants also argued that they are entitled to summary judgment on Plaintiff's Title VII retaliation claim, but Plaintiff stated that he is not pursuing such a claim.

In his Response, Plaintiff first argues that, based upon this record, there is circumstantial evidence of discrimination sufficient to raise a genuine issue of material fact under the direct method of proof. Plaintiff relies upon the voting record of the Department Promotion and Tenure Committee and the statement made by Greene regarding Chinese students. This court agrees with Defendants that this evidence cannot be considered circumstantial evidence of discrimination in this case. The method of proving discrimination by putting forth evidence of discriminatory motivation often is called the "direct" method. Rudin v. Lincoln Land Comty. Coll., 420 F.3d

712, 720 (7th Cir. 2005). In order to establish his prima facie case under the direct method, Plaintiff must prove that Defendants were motivated by animus based upon his race and national origin when he was denied promotion and tenure. See Mosley v. Maytag Corp., 2006 WL 213950, at *4 (C.D. Ill. 2006). A plaintiff proceeding according to the direct method may rely on two types of evidence: direct evidence or circumstantial evidence. Rudin, 420 F.3d at 720.

In this case, Plaintiff does not claim to have direct evidence of discrimination. However, as noted, Plaintiff does contend that he has circumstantial evidence. Circumstantial evidence of discrimination is evidence which allows the trier of fact to infer intentional discrimination by the decisionmaker. Rudin, 420 F.3d at 720. The Seventh Circuit has recognized three kinds of "circumstantial" evidence of intentional discrimination : (1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer's reason is a pretext for discrimination. Rudin, 420 F.3d at 720-21. A plaintiff can avoid summary judgment based upon such circumstantial evidence by "creat[ing] a triable issue of whether the adverse employment action of which [he] complains had a discriminatory motivation." Rudin, 420 F.3d at 721, quoting Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997). "All that is required is evidence from which a rational trier of fact could reasonably infer that the defendant had [terminated] the plaintiff because the latter was a member of a protected class." Troupe v. May Dept. Stores Co., 20 F.3d 734, 737 (7th Cir. 1994).

Nevertheless, even circumstantial evidence must point directly to a discriminatory reason for the employer's action. Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003); Brewer v. Bd. of Trs. of the Univ. of Ill., 407 F. Supp. 2d 946, 964 (C.D. Ill. 2005). Plaintiff's argument regarding the voting record of the Department Promotion and Tenure Committee is imaginative, but unsupported by any case law and ultimately unpersuasive. Plaintiff notes that, between the years of 1993 to 2003, the four members of the Department's Promotion and Tenure Committee voted on 19 promotion candidates, two of whom were Asian and from the People's Republic of China (Shang and Plaintiff) and 17 of whom were Caucasian. According to Plaintiff, the Department Promotion and Tenure Committee voted unanimously against Shang and Plaintiff and, in almost every case, voted unanimously in favor of the Caucasian candidates. The problem with Plaintiff's argument is that Shang was given tenure and promoted by the Department and the vote against Plaintiff by the Department Promotion and Tenure Committee had no effect because, after Weaver became Department Head in 2000, it was the vote of the full tenured faculty which counted. This court therefore concludes that this evidence cannot be considered "statistical" evidence that similarly situated employees outside the protected class received systematically better treatment. See Rudin, 420 F.3d at 721; Mosley, 2006 WL 213950, at *5-6.

Plaintiff also argues that Greene's remark about Chinese students constitutes circumstantial evidence of discrimination. Plaintiff concedes that Greene's remark is not direct evidence of discrimination against Plaintiff because Greene referred to "students" and not "Professors." However, Plaintiff contends that Greene's remark is circumstantial evidence in this case because it shows that Greene held prejudicial views about the Chinese. Plaintiff further argues that this remark was contemporaneous with and temporally related to the adverse employment action because the remark occurred at the time the

Department Promotion and Tenure Committee, of which Greene was a member, was discussing Plaintiff's case and was working on the selection of external evaluators for Plaintiff's dossier. Plaintiff contends that Greene used his influence as a member of the Department Promotion and Tenure Committee, and especially as the Director of MRL, to influence other faculty members to vote against Plaintiff. Plaintiff contends that Greene told the faculty members that Plaintiff was not worthy of promotion and misrepresented Plaintiff's records in publications and grant applications.

Defendants contend, however, that Greene's remark about Chinese students was a "stray workplace remark" that is not evidence of discrimination. Defendants also argue that the evidence does not show that Greene misrepresented Plaintiff's credentials but rather shows that Greene only expressed his opinion about Plaintiff's scholarship. "Stray remarks that are not 'proximate and related to the employment decision' are insufficient to defeat summary judgment." Lerner v. Ravenswood Hosp. Med. Ctr., 1999 WL 1267710, at *5 (N.D. Ill. 1999), quoting Bahl v. Royal Indem. Co., 115 F.3d 1283, 1293 (7th Cir. 1997). However, the statements of one who lacks the final decision-making authority may be probative of intentional discrimination if that individual exercised a significant degree of influence over the contested decision. Lerner, 1999 WL 1267710, at *5; Porter v. State of Ill., Dep't of Children & Family Servs. , 987 F. Supp. 667, 673 (N.D. Ill. 1997), aff'd, 165 F.3d 32 (7th Cir. 1998).

In this case, Greene did not make the decision to deny tenure to Plaintiff. Instead, he had just one vote when the tenured faculty of the Department voted on Plaintiff's tenure. Where an individual defendant casts only one of many votes, the defendant's actions are "too attenuated from the adverse actions befalling Plaintiff to constitute probative evidence of intentional discrimination." Lerner, 1999 WL 1267710, at *5

(N.D. Ill. 1999), citing McCarthy v. Kemper Life Ins. Cos., 924 F.2d 683, 686 (7th Cir. 1991) ("statements by non-decision makers or statements by decision makers unrelated to the decisional process itself" do not suffice to satisfy the plaintiff's burden).

Based upon the applicable case law, this court concludes that accepting Plaintiff's argument that intentional discrimination can be inferred from Greene's statement would require multiple layers of speculation. The trier of fact would have to infer from Greene's one-time remark that he harbored a bias against Plaintiff because Plaintiff is Chinese and that, based upon this discriminatory animus, Greene attempted to influence other faculty members to vote against Plaintiff. Further, the trier of fact would have to infer that other faculty members were so influenced and this influence somehow carried on through the numerous reviews of Plaintiff's case and dossier which occurred at various levels at the University. This court concludes that the trier of fact simply could not reasonably make such inferences. This court agrees with Defendants that Plaintiff has presented absolutely no evidence that anyone was influenced by Greene or his alleged discriminatory animus. See McMiller v. Bd. of Trs. of Univ. of Ill., 275 F. Supp. 2d 974, 980 (N.D. Ill. 2005).

Moreover, this court agrees with Defendants that the final decision in this case was made by Herman, after multiple layers of review, including the review by the ad hoc committee.6 There is absolutely no evidence that Greene had any influence over Herman's decision. According to Tucker's affidavit, which Plaintiff has not attempted to contradict, the discussions of the ad hoc committee "centered around the quality of the work of Professor Sun as reflected in his dossier with updates, and the traditional factors of service, teaching and research which are the bases for making determinations about tenure." Tucker also stated that it was his opinion, based upon

his evaluation of the dossier and the other materials provided by Plaintiff, that Plaintiff "was not deserving of tenure in the Materials Science and Engineering Department, one of the top two or three departments in the United States." Tucker stated that this "was the consensus of the committee." Plaintiff's only attack on the review of the ad hoc committee is that the committee was provided with Robertson's reasons for the Department's decision which, according to Plaintiff, means that it was not an "independent" review. This court does not agree. Obviously, the ad hoc committee had to review something. If the reasons Robertson gave were inadequate, or not based upon the facts set out in the dossier, the ad hoc committee, whose members were senior scholars agreed upon by Plaintiff, was uniquely qualified to recognize those problems. Tucker stated that he had previously had the opportunity to review hundreds of dossiers and materials provided with respect to candidates for tenure. Based upon its review, the ad hoc committee made its own determination that Plaintiff did not qualify for tenure.

FN. 6 Although the recommendation of the Provost regarding tenure is a recommendation which must be ratified by the Chancellor and the Board of Trustees, it is undisputed that, as a practical matter, the review by the Provost's office is the last real review of the tenure decision.

The Seventh Circuit has stated: [I]t is clear that, when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant. Willis v. Marion County Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997). This court concludes that this reasoning applies here and means that any bias on the part of Greene is irrelevant in this case. This case is not similar to the situation in the case relied upon by Plaintiff, Russell v. Bd. of Trs. of the Univ. of Ill., 243 F.3d 336 (7th Cir. 2001).7 In Russell, the Seventh

Circuit concluded that the improper motives of the plaintiff's supervisor "had to be imputed to the other members of the disciplinary committee because of [the supervisor's] extensive role in initiating and carrying out the disciplinary process." Russell, 243 F.3d at 342. That is clearly not the situation here. Based on this record, Greene did not have an "extensive role" in making the tenure decision and, therefore, there is no basis for imputing any improper motives he had to the actual decisionmaker. Greene cannot be considered a decisionmaker under the facts of this case, so his remarks do not constitute circumstantial evidence of discriminatory motivation. See Crabtree v. Nat'l Steel Corp., 261 F.3d 715, 723 (7th Cir. 2001); see also Mlynczak v. Bodman, 442 F.3d 1050, 2006 WL 851644, at *5 (7th Cir. 2006); Mosley, 2006 WL 213950, at *4. Therefore, this court concludes that Plaintiff cannot defeat summary judgment on his discrimination claims under the direct method of proof.

FN. 7 This court notes that Plaintiff has also relied upon a decision of the Third Circuit Court of Appeals, Roebuck v. Drexel Univ., 852 F.2d 715, 727 (3d Cir. 1988) and the Ninth Circuit Court of Appeals, Lam v. Univ. of Haw., 164 F.3d 1186, 1188 (9th Cir. 1999). This court concludes that the underlying reasoning of these cases is inconsistent with Seventh Circuit case law on the subject of tenure. Accordingly, this court does not find the reasoning of either case applicable or persuasive.

Plaintiff also argues that he has sufficient evidence to avoid summary judgment under the McDonnell Douglas indirect method. Under this method, Plaintiff must first demonstrate a prima facie case of discrimination by showing that: (1) he is a member of a protected class; (2) he was qualified for tenure; (3) he was denied tenure; and (4) a similarly situated applicant not in the protected class was granted tenure. See Namenwirth v. Bd. of Regents, 769 F.2d

1235, 1240 (7th Cir. 1985); Sinha v. Bd. of Trs. of the Univ. of Ill., 2001 WL 921718, at *14 (N.D. Ill. 2001). If Plaintiff is able to establish a prima facie case, the burden of production shifts to Defendants to articulate a nondiscriminatory reason for denying Plaintiff tenure. Sinha, 2001 WL 921718, at *14. If Defendants produce a nondiscriminatory reason for the decision, Plaintiff must then prove that the Defendants' stated reason is merely a pretext for discrimination based upon race and national origin. See Sinha, 2001 WL 921718, at *14. In order to carry his burden, Plaintiff must provide evidence that Defendants' explanation for the denial of tenure has no basis in fact, was not the real reason, or was insufficient to motivate the action. Sinha, 2001 WL 921718, at *14, citing Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc., 254 F.3d 644, 652 (7th Cir. 2001). This is an extremely difficult burden to carry "[d]ue to the layered and subjective nature of the tenure process, and the courts' recognition that such decisions are based on the fine 'distinction between competent and superior achievement.'" Sinha, 2001 WL 921718, at *14, quoting Kuhn v. Ball State Univ., 78 F.3d 330, 331 (7th Cir. 1996).

In this case, even assuming Plaintiff could establish a prima facie case of discrimination, 8 this court concludes that Defendants have articulated a nondiscriminatory reason for denying Plaintiff tenure and that Plaintiff has not shown that Defendants' explanation is a pretext for discrimination. Defendants have stated that Plaintiff was denied tenure because his dossier was simply inadequate so that multiple groups and individuals determined that he did not deserve tenure. In this case, as the court in Sinha recognized is often the case in tenure cases, the reasons can be distilled to one, Defendants "did not find Plaintiff to be, on the whole, exceptional enough to warrant the coveted position of Associate Professor with tenure." Sinha, 2001 WL 921718, at *14 n.12. The Seventh Circuit has stated that "[t]enure requires something more [than mere qualification]; it requires that the department believe that the

candidate have a certain amount of promise." Namenwirth, 769 F.2d at 1242. The Seventh Circuit further stated: It is not our role, as federal courts have acknowledged, to consider merely the hard evidence of research output and hours spent on committee work, and reach tenure determinations de novo. A crucial part of the evidence we rely on is the esteem by which the candidate is held by the very persons making the tenure decision. Namenwirth, 769 F.2d at 1242. Therefore, courts "must not second-guess the expert decisions of faculty committees in the absence of evidence that those decisions mask actual but unarticulated reasons for the University's action." Vanasco v. Nat'l-Louis Univ., 137 F.3d 962, 968 (7th Cir. 1998). "[T]hat seems to mean that in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose." Sinha, 2001 WL 921718, at *17. "Tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments." Lopez v. Bd. of Trs. of the Univ. of Ill. at Chicago, 344 F. Supp. 2d 611, 621 (N.D. Ill. 2004). It is well established that the court does not tell employers what the requirements for a job must be. McMiller, 275 F. Supp. 2d at 981.

Fn. 8 Defendants have argued that Plaintiff cannot establish a prima facie case of discrimination because he did not show that he was qualified for tenure or that Bellon is similarly situated in all respects. This court concludes that it is not necessary to make a determination on these issues.

Plaintiff first argues that Defendants' statement that Plaintiff lacked the required academic qualifications for tenure is pretextual because it is "conclusory and circular." Plaintiff contends that the reason given is conclusory because Defendants "failed to identify a single performance area in Plaintiff's dossier, such as Plaintiff's publication record, teaching performance, public service record, or external

evaluations, that Defendant[s] found lacking" and is circular because it is substantially the same as the conclusion. Plaintiff also contends that the stated reason is pretextual because his qualifications were clearly superior to Bellon's qualifications. This court does not agree with either argument. The record shows that detailed reasons were given for the decisions to recommend against tenure, so they cannot be considered "conclusory." In addition, the College Promotion and Tenure Committee provided a detailed comparison of Bellon's dossier and Plaintiff's dossier, a comparison this court is not qualified to second guess. See Vanasco, 137 F.3d at 968; Namenwirth, 769 F.2d at 1242; Sinha, 2001 WL 921718, at *17.

Plaintiff has also relied on all of the procedural infirmities that he believes tainted the tenure decision in this case, arguing that Defendants have failed to show that the various administrators and committees who reviewed Plaintiff's case and dossier evaluated Plaintiff fully and independently. This court must conclude, however, that while Plaintiff may not have agreed with the procedures used for reviewing his case, he has not shown that the decisions reached were not honest judgments made based upon his dossier. See Vanasco, 137 F.3d at 967-78. In sum, this court concludes: (1) there is no evidence that Averback made any attempts to obtain unfavorable external evaluations for Plaintiff or did anything other than follow Communication No. 9, to the best of his ability, in obtaining external evaluations for Plaintiff, evaluations which were considered good by the majority of individuals who have expressed an opinion; (2) there is no evidence that the Department improperly refused to include the unsolicited letters as part of Plaintiff's dossier as the record shows that these letters were not obtained in compliance with the procedures set out in Communication No. 9; (3) there is no evidence that the omission of conference proceedings from Plaintiff's dossier had any effect on the decision regarding tenure as it is the consensus of opinion that conference

proceedings are not a significant part of the dossier (see also Sinha, 2001 WL 921 718, at *3 ("conference presentations . . . are not counted in any performance/tenure/promotion evaluation")); (4) there is no evidence that the College Promotion and Tenure Committee did not fairly evaluate Plaintiff's dossier and fairly compare Bellon's dossier with Plaintiff's even though two members of the committee previously served on the Grievance Committee and, in fact, Cooper's deposition testimony that he did not let prior decisions influence him is the only evidence in the record on this point; and (5) as previously discussed, based upon Tucker's uncontradicted affidavit, there is no evidence that the ad hoc committee did not fairly and independently evaluate Plaintiff's dossier and the additional materials provided by Plaintiff even though the ad hoc committee was provided with Robertson's explanation of the Department's decision. Following this court's careful review of the record in this case, this court concludes that Plaintiff has not provided evidence that Defendants did not believe the reasons given for denying tenure were true at the time Plaintiff was denied tenure. See Lopez, 344 F. Supp. 2d at 621.

After reviewing the extensive record in this case, including the deposition taken of Plaintiff, this court has no doubt that Plaintiff, and others who supported his candidacy for tenure, sincerely believe that Plaintiff was treated unfairly and was a victim of discrimination. However, there simply is no evidence in this case sufficient to raise a genuine issue of material fact on this issue, under either the direct or indirect method of proof. As the Seventh Circuit recently stated, "if the subjective beliefs of plaintiffs in employment discrimination cases could, by themselves, create genuine issues of material fact, then virtually all defense motions for summary judgment in such cases would be doomed." Mlynczak, 442 F.3d 1050, 2006 WL 851644, at *5. Based upon the evidence before this court, this court agrees with Defendants that Plaintiff has not

shown any genuine issue of material fact which requires a trial so that Defendants are entitled to summary judgment on Plaintiff's claim of discrimination.

FN. 9 Plaintiff has stated that he has not asserted a cause of action against the Board of Trustees under 42 U.S.C. § 1983.

III. FIRST AMENDMENT CLAIMS

In Count II of his Amended Complaint, Plaintiff has alleged that Weaver, Daniel, Robertson, Herman, Averback and Greene violated his First Amendment rights.9 The First Amendment protects the freedom of speech and expressive conduct and generally prevents the government from proscribing such activities. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992); Lopez, 344 F. Supp. 2d at 622. To establish a claim for retaliation based on the First Amendment, Plaintiff must establish that (1) his speech was constitutionally protected, and (2) his constitutionally protected speech motivated the individual defendants' actions. Lopez, 344 F. Supp. 2d at 622, citing Vukadinovich, 278 F.3d at 699. "If these two elements are established, the burden shifts to the government to prove that their interest in efficient management outweighed the plaintiff's interest in freedom of expression, or that they would have taken the action regardless of the statement." Miller v. Jones, ___ F.3d ___, 2006 WL 988046, at *5 (7th Cir. 2006).

To be protected, employee speech must relate to a matter of "political, social, or other concern to the community." Miller v. Jones, 2006 WL 988046, at *5, quoting Connick v. Myers, 461 U.S. 138, 146 (1983). In Connick, the Supreme Court held that when an "employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of the

personnel decision taken by a public agency . . . ." Miller 2006 WL 988046, at *5, quoting Connick, 461 U.S. at 147. To determine whether the employee's speech was that of a citizen on matters of public concern, a court looks to the content, form, and context of the statement. Miller, 2006 WL 988046, at *5, citing Connick, 461 U.S. at 147-48. Of these three, content is the most important. Miller, 2006 WL 988046, at *5. In evaluating these factors, courts look at whether the government employee sought to "bring to light actual or potential wrongdoing or breach of public trust." Miller, 2006 WL 988046, at *5, quoting Connick, 461 U.S. at 148. Not all matters that transpire in a government office are of public concern. Miller, 2006 WL 988046, at *5, citing Connick, 461 U.S. at 149. Instead, "public concern is the 'subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. . . .'" Miller, 2006 WL 988046, at *5, quoting City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004). Whether the statement rises to the level of public concern is a question of law. Connick, 461 U.S. at 148, n.7; Miller, 2006 WL 988046, at *5.

In this case, Defendants argue that Plaintiff's decision not to nominate Weaver for the Burnett Teacher of the Year award did not constitute speech on a matter of public concern. They contend that it was not a matter of public concern whether Weaver or Averback won the Department's Teacher of the Year award. Defendants point out that Plaintiff's allegedly protected speech related to a single, privately funded award which, although it may be important to the recipient, was of relatively small consequence to the general public.

In response, Plaintiff contends that this speech was of public concern because "educational improvement and fiscal responsibility in public schools clearly are matters of public concern," citing Klug v. Chicago Sch. Reform Bd. of Trs., 197 F.3d 853, 858 (7th Cir. 1999). Plaintiff noted that the award

winner was announced in the College of Engineering and in other public forums and argues that this information was not only important to the recipient but also "to the current and future students of the Department, their parents, and alumni who were concerned about the quality of teaching in a public institution." In addition, Plaintiff has argued that his complaint to the Faculty Advisory Committee about Weaver's retaliation was also protected speech.

This court concludes that the issue of whether Plaintiff's speech constituted speech on a matter of public concern is a close one. However, this court concludes that Plaintiff has persuasively argued that the Teacher of the Year award was publicized and was of interest to the public. This court therefore concludes that Plaintiff's speech related to a "subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." See Miller, 2006 WL 988046, at *5. This court also agrees that Plaintiff's complaint to the Faculty Advisory Committee was protected speech.

Defendants also argue, however, that Plaintiff's alleged speech was not a motivating factor in denying him tenure, and that the University would have denied him tenure even in the absence of his speech. Defendants point out that there is no evidence in the record that Weaver actually influenced even a single vote in the original decision. Moreover, the original decision was subsequently reviewed at multiple levels, and there is no evidence that this review was affected by any retaliatory motive on the part of Weaver. Defendants contend that no action of Weaver may be imputed to the final decision in this case. Plaintiff argues, in response, that "Weaver played a critical and influential role in the decision to deny Plaintiff promotion and tenure because he made the initial recommendation against Plaintiff and there were no independent and substantive evaluations of Plaintiff's dossier after that recommendation." This court agrees with Defendants'

argument.

A causal link between the protected expression and an adverse employment action may be established by showing that the protected conduct was a substantial or motivating factor in the employer's decision. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). A "motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant's actions." Spiegla v. Hull, 371 F.3d 928, 942 (7th Cir. 2004).

This court agrees with Defendants that, in order to accept Plaintiff's argument that his speech was a motivating factor in the decision to deny him tenure, this court would have to infer that the Department's faculty were influenced by Weaver when they voted on October 2 and October 30, 2002, even though there is no evidence that anyone was so influenced. This court would also have to infer that the faculty remained influenced by Weaver when they voted on July 8, 2003, even though Weaver did not attend the meeting and no longer had any ability to make decisions affecting them after he resigned as Department Head in January 2003. Even assuming that this court could reasonably make those inferences, this court would then have to infer that all of the other individuals who evaluated Plaintiff's dossier after July 2003, including the College Promotion and Tenure Committee, Dean Daniel, the ad hoc committee, and Provost Herman, were unable to make an objective judgment about the strength of Plaintiff's qualifications because of the initial recommendation which was based upon Weaver's retaliatory motive. This court agrees with Defendants that this scenario is simply and entirely implausible. This court concludes that the evidence does not support Plaintiff's assertion that "once Weaver made the recommendation to deny Plaintiff promotion and tenure, there was not a single independent, fresh, and substantive review of Plaintiff's merits." This court concludes that the extensive

record in this case shows that Plaintiff's dossier was carefully evaluated multiple times and found insufficient to warrant tenure. This court therefore agrees with Defendants that no reasonable interpretation of the facts could support the contention that any alleged grudge Weaver held against Plaintiff because of the Burnett Teacher of the Year Award infected the final decision.

FN. 10 This court notes that it agrees with Defendants that Robertson, at his deposition, provided legitimate reasons for asking Plaintiff to resign from the Burnett Teacher of the Year Award selection committee. Moreover, the record shows that, when Plaintiff objected, Robertson allowed him to remain on the selection committee. This court also agrees that there was nothing sinister in Robertson's concern that deliberations regarding personnel decisions be kept confidential and that Robertson provided a reasonable explanation for all of his actions in this case.

Plaintiff has also argued that Robertson was motivated to retaliate against Plaintiff because of Plaintiff's complaint to the Faculty Advisory Committee, which Robertson told Plaintiff was an attack on the Department, and that the other individual Defendants either participated in the retaliation or did nothing to stop it. Plaintiff argues that Robertson's retaliatory motivation is demonstrated by his attempt to remove Plaintiff from the committee deciding the recipient of the Burnett teaching award in 2003, by his demand for confidentiality at the July 8, 2003, meeting, by his decision not to update Plaintiff's dossier before the meeting, by his decision not to appoint an external committee to review Plaintiff's dossier, and by his strongly worded recommendation to deny Plaintiff promotion and tenure. This court concludes, after its careful review of the record in this case, that it would be a stretch for a trier of fact to decide that Robertson's actions were motivated by a retaliation.10 However, even if this court

assumed that Robertson had a retaliatory motivation in taking these actions, there is no evidence that the subsequent reviews of Plaintiff's dossier after the July 2003 recommendation were in any way motivated by retaliation because of Plaintiff's complaint to the Faculty Advisory Committee.

Based upon this record, this court finds that only one conclusion can be reached, that Plaintiff's protected speech was not a motivating factor in the decision to deny him tenure and promotion. Accordingly, this court agrees with Defendants that Plaintiff has not shown that there is a genuine issue of material fact regarding this claim that requires a trial. Therefore, Defendants are entitled to summary judgment on Plaintiff's claim of retaliation.

REMAINING RELATED MOTIONS

I. DEFENDANT HERMAN'S MOTION TO CORRECT

On December 29, 2005, Defendant Herman filed a Motion to Correct Typographical Error in his Reply (#127). Plaintiff has not responded to this Motion, so this court presumes there is no opposition. Accordingly, Defendant Herman's Motion to Correct (#127) is GRANTED.

II. MOTIONS TO STRIKE

This court first notes that motions to strike are disfavored. See Clegg v. The Sullivan Corp., 2003 WL 21254558, at *1 (S.D. Ind. 2003). Therefore, generally, it is not this court's practice to grant motions to strike when ruling on motions for summary judgment. See Fenje v. Feld, 301 F. Supp. 2d 781, 789 (N.D. Ill. 2003).

A. DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S AFFIDAVIT

On December 19, 2006, Defendants filed their Motion to Strike Plaintiff's Affidavit (#123). Defendants noted that Plaintiff filed his Affidavit on December 2, 2005, in support of his Responses to Defendants' Motions for Summary Judgment. In his Affidavit, Plaintiff stated that he interviewed for a position at the Lawrence Livermore National Laboratory and a position at the University of Florida at Gainesville, Florida. Plaintiff stated that he was not hired for either position. Defendants state that Plaintiff has offered these statements to suggest that he was somehow "blackballed" from employment by one or more Defendants. Defendants argue that this is inadmissible hearsay and that the only competent testimony in this case concerning Plaintiff's employment prospects is Plaintiff's deposition testimony that he was offered a job as a tenure-track professor at Virginia Tech University and turned it down.

On December 22, 2005, Plaintiff filed his Response to Defendants' Motion to Strike (#126). Plaintiff argues that the statements in his affidavit are not inadmissible hearsay because they are testimony based on his own direct knowledge of the facts.

This court has considered the statements in Plaintiff's affidavit and concludes that they have no relevance to Plaintiff's claim of discrimination and First Amendment retaliation. Accordingly, Defendants' Motion to Strike Plaintiff's Affidavit (#123) is DENIED as moot.

III. PLAINTIFF'S MOTION TO STRIKE

On December 20, 2006, Plaintiff filed a Motion to Strike Portions of the Replies filed by Defendants Greene and Board of Trustees (#125). Plaintiff stated that Defendant Greene stated in his Reply that "Greene supported hiring

Plaintiff in the first instance, and was instrumental in bringing Jian-Min Zuo, also Chinese, to the Department." Plaintiff also noted that Defendant Greene stated "Plaintiff also fails to note that Greene was just as influential when Plaintiff was hired, but approved Plaintiff's hiring." Plaintiff stated that Defendant Board of Trustees similarly raised the same-actor defense in its Reply Brief. In addition, Plaintiff complained that Greene stated the following in his Reply: The Plaintiff likewise ignores the fact that since Greene left, two Chinese members of the Department of Materials Science & Engineering, Jian-Min Zuo (recruited by Greene) and David [sic] Wong, have received positive recommendations for tenure from the Department. (Schweizer Dep. p. 70). Therefore, three of the four Chinese candidates for tenure in the Department of Materials Science at the University of Illinois have received tenure, or are about to. There is no basis for asserting any statistical significance to the Plaintiff's unsuccessful candidacy.

Plaintiff pointed out that these promotion cases were pending as of Kenneth Schweizer's deposition on November 11, 2005. However, Plaintiff did not otherwise challenge the factual accuracy of the statements in Greene's Reply. Instead, Plaintiff argued that the statements should be stricken because they were arguments made for the first time in a Reply Brief, because the Seventh Circuit has "emphatically rejected the same-actor inference in the race-discrimination setting," and because the recent promotion cases referred to occurred nearly two years after the filing of this case. On December 29, 2006, Defendants filed their Response to Plaintiff's Motion to Strike (#128). Defendants argued that the inferences in the Reply Briefs to the fact that Defendant Greene participated in the decision to hire Plaintiff and brought other Chinese to the Department was a legitimate response to the issues raised by Plaintiff in his Responses to the Motions for Summary Judgment. Defendants also disagreed with Plaintiff about Seventh Circuit case law regarding the same-actor inference

and argued that Defendants' response was a legitimate rebuttal of Plaintiff's argument that this court should infer bias because Defendant Greene, in Plaintiff's judgment, did not have enough Chinese graduate students. Defendants also argued that the reference to the fact that, since Plaintiff's tenure application was considered, the Department has considered two other Chinese faculty members and recommended them for tenure was an appropriate response to Plaintiff's statistical analysis.

This court considered, but did not rely on, the additional facts included in Defendant Greene's and Defendant Board of Trustee's Reply Briefs in ruling on Defendants' Motions for Summary Judgment. Accordingly, Plaintiff's Motion to Strike (#125) is also DENIED as moot.

IT IS THEREFORE ORDERED THAT:
(1) Defendants' Amended Motions for Summary Judgment (#97, #98, #99, #100, #101, #102, #103) are GRANTED. Judgment is hereby entered in favor of Defendants and against Plaintiff.
(2) Defendant Herman's Motion to Amend Reply (#127) is GRANTED.
(3) Defendants' Motion to Strike Plaintiff's Affidavit (#123) is DENIED as moot.
(4) Plaintiff's Motion to Strike Portions of the Reply of Greene and the Board of Trustees (#125) is DENIED as moot.
(5) The Motions in Limine (#130, #131, #132, #133, #134, #135, #136, #137, #138, #139) filed by the parties are MOOT.
(6) This case is terminated.

ENTERED this 2nd day of May, 2006
s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
CHIEF U.S. DISTRICT JUDGE

Appendix D

In the

United States Court of Appeals
For the Seventh Circuit

No. 06-2438

YONG-QIAN SUN,
Plaintiff-Appellant,

v.

THE BOARD OF TRUSTEES OF
THE UNIVERSITY OF ILLINOIS;
RICHARD HERMAN; DAVID E. DANIEL;
ROBERT AVERBACK; JOHN H. WEAVER;
IAN M. ROBERTSON; AND JOSEPH E. GREENE,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 03-CV-2221—Michael P. McCuskey, Chief Judge.

ARGUED DECEMBER 5, 2006—DECIDED JANUARY 16, 2007

Before FLAUM, WOOD, and EVANS, Circuit Judges.

FLAUM, Circuit Judge. The University of Illinois did not grant Yong-Qian Sun tenure after numerous committees and faculty members considered his case. Alleging various procedural irregularities and nefarious motives, Sun filed suit against the Board of Trustees of the University as well as members of its faculty. After the defendants' counsel failed to

comply with discovery and the court granted several motions to compel discovery, it entered default judgment against the defendants. Soon after, the court vacated the default, and, eventually, granted summary judgment i favor of all defendants. Sun appeals both the vacation of the default judgment and the court's grant of summary judgment. For the following reasons, we affirm.

I. BACKGROUND

The University of Illinois ("University") hired Yong-Qian Sun, a native of China, as an assistant professor in August 1997. He worked in the University's Department of Materials Science and Engineering in the College of Engineering ("the Department"). The Department evaluates assistant professors in their fifth year of employment for promotion to associate professor with tenure. If the Department decides to deny promotion and tenure, it issues the tenure applicant a notice of nonreappointment and ultimately terminates the professor's employment.

In 2001, a year before his tenure review commenced, Sun received the Donald Burnett Teacher of the Year Award. The winner of the award was announced in College and Department publications and received $8,000. In keeping with Department tradition, Sun and Pascal Bellon, a previous award recipient, were slated to choose the 2002 award winner. John Weaver, the Department Head, strongly suggested that Sun consider him for the award. Despite the suggestion, Sun and Bellon selected another faculty member, Robert Averback, as the winner. On April 9, 2002, when Sun sent Weaver an e-mail recommending that Averback be given the award, Weaver became extremely upset with Sun. The following month, Weaver informed Sun that he would no longer receive income generated by his online teaching, due to a change in Department policy. Interestingly, the policy change affected only Sun.

In the Spring of 2002, the Department was considering Sun's candidacy for tenure and promotion. At that time, John Weaver was Department Head and David Daniel was Dean of the College of Engineering. Robert Averback, Joseph Greene, and Ian Robertson were tenured faculty members in the Department. Richard Herman was the Provost of the faculty for the University. To aid the process, the Department's Promotion and Tenure Committee ("PTC") prepared and collected information about tenure candidates. The PTC obtained biographical information from the candidate, obtained written evaluations from selected scholars outside of the University, and compiled internal evaluations of the candidate's teaching, research, and public service. That information was compiled in a document known as a dossier. Averback and Greene served as two of the PTC's four members, and Averback acted as chairman.

Members of the faculty considered Greene powerful and influential because he controlled federal block funding ranging from $8 to $9 million per year, which meant that many professors in the Department relied on Greene's allocations to support their research. At a May 15, 2002 faculty meeting, during a recruitment discussion, Greene said that he would not accept any Chinese graduate students and that he would not interview them. Following the meeting, Weaver asked Greene about the comment. Greene said it was a stupid remark and that he had no problems dealing with Chinese people. Greene later called his comment a "throwaway remark," made to express his dissatisfaction with the length of a discussion on recruiting international students, including those from Asia. Greene had previously accepted and worked with two Chinese graduate students. 1

FN 1. Greene's remark resulted in an exchange of e-mails, including an e-mail from Weaver to all of the professors in the Department which stated, "Friends, This is to reaffirm

something that should be part of our department culture—that we welcome people from all lands, of all backgrounds, and that we seek to provide a supportive atmosphere for them to do the best work that they can." Greene responded with an e-mail which stated that "[w]e should have agreed upon departmental [guidelines] (not strict numbers!) regarding the fraction of US/foreign graduate students we admit. I suggest that a reasonable goal would be 2/3 U.S. and 1/3 foreign with a 'maximum' of 50% foreign." (emphasis in original).

The PTC placed Averback in charge of obtaining external evaluators for Sun. This task was governed to a large degree by Provost Communication No. 9, a document that set out instructions for preparing a candidate's dossier. It provides, among other things, that evaluation letters must be sufficient in number, from appropriately selected individuals at peer institutions, and from objective evaluators without conflicts of interest. The candidate must be provided with an opportunity to nominate external evaluators, but the department must also seek letters from evaluators other than those suggested by the candidate. Communication No. 9 states that a "majority of the external evaluations should come from the department's, rather than the candidate's, nominations." It also states that the "candidate has no privilege of vetoing external reviewers, but may indicate individuals whom he or she considers inappropriately biased." However, the "candidate cannot reasonably request avoidance of more than one or two individuals." Communication No. 9 states that the external evaluations "are critical components of the dossier and play a major role in the decision-making process."

FN. 2 The Department is one of the highest ranked departments of its kind in the country, and the University's College of Engineering is among the highest ranked Colleges of Engineering. This limited the number of evaluators who could be considered appropriate based upon Communication No. 9.

On May 21, 2002, Sun suggested, in writing, five external evaluators. Averback found three of the suggested evaluators inappropriate because they were from outside of the University's peer rank.2 Averback gave the names of the other two suggested evaluators to Weaver, and Weaver formally requested the evaluations. One of the suggested evaluators provided an evaluation that was included in Sun's dossier. The other wrote back and, in his response, included a comment very critical of a paper coauthored by Sun. Averback determined that, based upon this comment and the fact that the evaluator resided outside of the U.S., the PTC would not include the letter from him.

Sun provided one name, in writing, of an evaluator he did not want used, and the PTC did not solicit a letter from that evaluator. Sun also orally informed Averback of additional persons that might be biased against him.3 Averback testified that, because of problems he encountered with obtaining a sufficient number of qualified external evaluators, he eventually requested and obtained letters from the potentially biased evaluators— Michael Mills and Patrick Veyssiere.4 Averback obtained a total of seven external evaluation letters. While several faculty members stated that they felt the letter from Mills was somewhat weak, the majority of the faculty members who expressed an opinion stated that the external evaluation letters included in Sun's dossier were good.

FN. 3 Sun thought the two professors might be biased against him because he had negatively reviewed articles they had submitted for publication.

FN. 4 Sources inside and outside of the Department recommended Mills as an external evaluator.

Prior to 2000, the PTC was solely responsible for voting on tenure candidates and recommending to the Department

Head whether tenure should be awarded. After Weaver became Department Head, this procedure changed so that the recommendation to the Department Head was based upon the vote of all tenured faculty in the Department rather than just the four members of the PTC. The first candidate for tenure subject to this procedure was Pascal Bellon, who was up for promotion and tenure in 2001. In Bellon's case, after two faculty meetings, ten faculty members voted in favor of tenure, ten faculty members were opposed to tenure, and one faculty member abstained. On September 27, 2001, Weaver wrote to Bellon and advised him that he would not be recommended for promotion. However, after Bellon appealed this decision to faculty and took various steps to explain and improve his dossier, he was recommended for tenure by a vote of 17-4. In Sun's case, the first faculty meeting to discuss his candidacy for tenure was held on September 20, 2002. As the new Chairman of the PTC, Averback presided over the meeting. He began the meeting by discussing the necessary qualifications for tenure, noting that Sun did not meet the Department's standards in some areas. Weaver told the faculty that if they weren't certain about how to vote, they should vote "no." The Department selected Bellon to present Sun's case, and Bellon gave a positive presentation. During the meeting, both Weaver and Greene made remarks critical of Sun and Weaver downplayed the importance of teaching in a tenure decision.

On September 23, 2002, pursuant to the University's tenure evaluation process, Sun presented a colloquium in which he discussed the research he had done at the University and answered questions. Prior to the colloquium, Sun met with Ian Robertson, another faculty member, to present a "rehearsal" of his colloquium material. Robertson urged Sun to revise the colloquium to make it resonate with faculty that were not experts in Sun's field. Because of these late revisions, Sun replaced some of his presentation slides with handwritten transparencies, which Weaver subsequently criticized.

On October 2, 2002, another meeting was held in which the faculty discussed Sun's qualifications and voted on whether he should be recommended for tenure. Prior to the vote, Weaver discussed Sun's candidacy with some members of the faculty and made negative comments. For example, Weaver asked Bellon how he was going to vote and suggested that Sun was not the kind of person he would want to be stuck with for 25 years. Bellon disagreed and walked away, although he felt pressured by Weaver. Ultimately, Bellon voted in favor of tenure. James Economy, the former head of the Department, testified that Weaver approached him two to three times to make negative comments about Sun and also discouraged him from voting. Despite his attempts, Weaver was not successful in influencing Economy's vote. The faculty voted by secret ballot, thirteen against tenure and six in favor. Shortly thereafter, Weaver asked for a vote of the PTC, which voted 4-0 against tenure. Weaver then notified Sun that he intended to recommend against tenure and that Sun had a right to appeal. Sun asked the faculty to reconsider their decision and circulated a written appeal document. Prior to the faculty's appeal meeting, persons outside of the University, some of them very well-known in Sun's field, submitted approximately 21 letters in support of his candidacy. Weaver, after consulting with Dean Daniel, sent everyone in the Department an e-mail suggesting that the letters were not appropriate and that they should not be considered. Despite Weaver's recommendation, the letters were provided to all members of the faculty before the appeal meeting.

On October 16, 2002, Sun asked a Department secretary for Donald Burnett's telephone number.5 This prompted Weaver to enter Sun's office yelling, among other things, "Don't fuck with people outside the University!"; " Don't fuck with alumni!"; "You are screwing yourself!"; and "Five minutes ago I thought you had a good brain to pass on to your children. I don't think so anymore!" After Weaver left Sun's

office, Sun wrote him a letter setting out these statements and protesting his behavior.

FN. 5 Burnett is an influential alumnus of the University for whom the teaching award is named.

On October 28, 2002, Sun spoke with Dean Daniel and complained that his unsuccessful bid for tenure was a result of Weaver inappropriately influencing the faculty in retaliation for not receiving the teaching award. Sun requested that a different committee hear his appeal. Subsequently, Dean Daniel spoke to four members of the Department, all of whom thought Weaver's behavior was appropriate. Weaver admitted that he remarked to Sun that the Department Head should be eligible for teaching awards. Weaver also admitted using profanity when hespoke to Sun on October 16, but denied any inappropriate attempt to influence the faculty vote.

On October 30, 2002, Daniel advised Sun via e-mail that Weaver's behavior was not inappropriate and that Sun's appeal would be heard by the original decision makers, i.e., the Department faculty. On October 30, 2002, the faculty met to reconsider their recommendation. Weaver chaired the meeting, and Bellon presented some of the information contained in Sun's additional letters of support. The faculty voted by secret ballot, returning nine votes in favor of tenure, nine votes against, and one abstention. Weaver advised Sun that the Department intended to affirm its original decision.

On November 5, 2002, Sun wrote to Gerald J. Janusz, the chairman of the Faculty Advisory Committee ("FAC"), a committee comprised of representatives elected from the entire University faculty, asking that the FAC consider his grievance over the denial of tenure. On November 14, 2002, Janusz appointed a subcommittee to investigate the procedures related to Sun's denial of tenure. (The FAC did not undertake any

substantive review.) After Sun filed another grievance with the College of Engineering, the FAC subcommittee decided to defer its consideration of his appeal until the other investigation concluded.

On November 22, 2002, Sun filed a grievance with the College of Engineering Grievance Committee. In his grievance, Sun asked the College Grievance Committee to investigate misconduct during the evaluation of his promotion in the Department. Specifically, Sun alleged that: (1) Averback asked for negative comments from external evaluators and biased the evaluators against him; (2) Weaver was prejudiced against him because he did not nominate Weaver "for an award he did not deserve"; (3) Weaver verbally abused him and his children; (4) Weaver inappropriately influenced the committee meetings on his promotion by misrepresenting his contributions; (5) Weaver treated proxy votes unfairly by accepting negative votes and discarding positive votes; and (6) the same committee was improperly used to evaluate his appeal. The Grievance Committee investigated the procedures in Sun's case, and, on December 27, 2002, issued a six-page report, which stated: The Grievance Committee finds that while there were certain areas in which departmental procedures, as well as the Department Head's handling, of Prof. Sun's promotion case could have been improved, it is our view that there were no procedural problems that ultimately resulted in an unfair or tainted adjudication of Prof. Sun's promotion case by the faculty of the Materials Science and Engineering Department. Consequently . . . we do not recommend that Prof. Sun's promotion case be reviewed in a second appeal.

In its report, the Grievance Committee discussed the specific allegations of misconduct, concluding that the evidence did not support many of the allegations. The Committee said, "while there is a perception on the part of some MatSE faculty members that Prof. Weaver was too forceful in his attempts to

sway faculty voting, particularly given his role as head of the department, there is no evidence that Prof. Weaver's actions were the reason that the voting faculty of MatSE ultimately did not support the promotion of Prof. Sun in either the original or appeals votes on his case." The Grievance Committee also found no evidence that the use of the same committee to evaluate Sun's appeal resulted in a biased review. Finally, the Grievance Committee report discussed Sun's allegations of verbal abuse by Weaver, stating, "there is evidence in this case that aspects of the 'Professionalism in the Work Place' memorandum distributed by the Dean on 9/18/02 were violated, particularly with respect to the use of disrespectful language and the display of unprofessional conduct." Nonetheless, the Grievance Committee concluded that Sun's allegations of verbal abuse were unrelated to his procedural allegations, since there was no evidence that the incident resulted in an improper handling of his promotion case. On January 22, 2003, Weaver resigned as Department Head, but remained a tenured member of the faculty. On January 24, 2003, Dean Daniel wrote to Sun, stating that, based upon the Grievance Committee's report, he affirmed his previous recommendation that Sun be issued a notice of nonreappointment.

On March 20, 2003, Ian Robertson became the Interim Department Head. In April, he met with Sun and suggested that Sun resign from the selection committee for the Burnett Teacher of the Year Award because he had taken actions against the Department. Sun refused to resign, stating that he could be fair in his considerations, and pointed out that he represented only one of four votes. Robertson agreed with Sun, and Sun helped select the 2003 award winner.

Soon thereafter, the FAC resumed its investigation of Sun's complaint. On May 15, 2003, the FAC issued a sixpage report to Provost Herman, which concluded that Sun's promotion and tenure dossier was not fairly considered. In

reaching its conclusion, the FAC found that the "Department Head inappropriately tried to negatively influence the promotion and tenure vote on Professor Sun's dossier." However, the FAC further stated that "proof that he actually influenced a faculty member into changing his/her positive vote to a negative one is absent." Nevertheless, the FAC determined that there was "convincing evidence to conclude that Professor Sun's dossier did not get a fair hearing." The report noted other procedural irregularities, such as inconsistent treatment of absentee ballots, different and more exacting standards compared to previous candidates, and Weaver's presiding over the faculty appeal. The FAC recommended to Provost Herman that "a more fair and impartial evaluation of Professor Sun's promotion and tenure dossier be undertaken."

Although it recognized that certain aspects of Sun's evaluation may have been unfair, the FAC rejected the allegation that Averback tried to influence the outcome of Sun's case. It concluded that Averback was "entitled to make negative evaluative comments about a candidate since he is a member of the faculty." The FAC noted that Averback's comments were made at an open faculty meeting. In addition, the FAC did not agree with Sun's allegation that Averback deliberately solicited letters from external evaluators who were biased. It stated that the "solicitation of an 'excluded' individual as an evaluator is consistent with Communication No. 9 which says that individuals cannot be excluded." After receiving the report of the FAC, Provost Herman decided that Sun's case should be reconsidered. Provost Herman, Dean Daniel and Robertson agreed that, because the faculty governance structure dictated that the faculty themselves decide promotion and tenure, the faculty should determine whether they could render a fair and impartial decision. If the faculty determined they could not be fair, an external committee would decide the matter.

On July 8, 2003, the faculty reconsidered Sun for tenure. Prior to this meeting, Sun provided Robertson with information about his professional activities since October 2002. Robertson considered this additional information to be marginal at best, so he decided not to add the material to Sun's dossier. According to Sun, he had a significant number of publications and accomplishments during this time which should have been added to his dossier. Despite the exclusion of the information, all questions about Sun's activities since the previous fall were answered during the discussion leading up to the vote. At the meeting, Robertson told the faculty that the FAC had determined that some of Weaver's activities were improper and may have tainted the decision. He also stated that it was determined by the FAC that there was no improper conduct regarding the outside evaluators. Robertson then polled the faculty members on whether they could fairly reconsider Sun's application for tenure. The faculty voted 13-4 that they could render a fair and impartial decision.

After this vote, Bellon made a presentation and a discussion followed. The faculty then voted eight in favor of tenure and ten against tenure, with one abstention. Weaver, who was not at the meeting, provided a proxy vote, but Robertson did not count it. Robertson then asked the faculty to vote on whether they believed the matter should be referred to an outside committee. The vote was five in favor and six against, with two abstentions. On July 10, 2003, Robertson wrote a letter to Dean Daniel which he forwarded with Sun's dossier. In the letter, Robertson described what happened at the faculty meeting and included a paragraph that stated:

While it is clear that Yong-Qian Sun is an excellent teacher and has . . . produced high-quality work, he has not been able to establish and sustain a highquality research program at the University of Illinois. The usual indicators of high-quality work (number of invited presentations at international and national meetings, invitations to join conference organizing committees,

research funding etc.) are missing. . . . [Sun's] total level of funding over a six-year period is $462,501, which comes to less than $80,000 per year. To put this in perspective, the average annual funding level per faculty in Materials Science and Engineering is in excess of $250,000. . . . While total funding should not be and was not an issue, Sun continues to resubmit proposals on similar topics, he does not appear to have learned from his failure, and he has not changed his approach to seeking funds from external agencies. . . . I recommend against the promotion of Yong-Qian Sun to the rank of Associate Professor with tenure. On July 11, 2003, Dean Daniel forwarded Sun's dossier to the College Promotion and Tenure Committee for review.6 Robertson's paragraph regarding his recommendation was included as part of the dossier.

FN. 6 The College Promotion and Tenure Committee is an entity distinct from the PTC, which represented Sun's department only, rather than the entire College of Engineering.

The College Promotion and Tenure Committee ("Committee") consisted of six members, one of whom was Weaver. However, Weaver and another member of the Committee were not involved in the review of Sun's dossier. Two of the four remaining members had been on the Grievance Committee that considered Sun's case, a fact about which Sun complained to Dean Daniel on July 16, 2003. Although Sun complained about the Committee's composition, Daniel let it proceed because he wanted to see its report, particularly since it was the only appointed entity to evaluate promotion cases.

On July 17, 2003, the Committee sent a seven-page report to Dean Daniel. The report stated that, following the Committee's review, it concluded that the decision by the Department "to not promote Prof. Sun was 'reasonable' in the sense that it was consistent with not only the current standards and past practices established by the MatSE department, but

ılso with the guidelines and procedures established by the Provost for promotion and tenure cases." The report then letailed the conclusions it reached following its review of Sun's record and its comparison of Sun's case to Bellon's. The eport stated that the "negative departmental votes in the Bellon ase indicate to us that the Bellon case was near the borderline of what is acceptable to the MatSE faculty for promotion to ıssociate professor with tenure" and thus "offers an important oint of reference for the Sun case." The Committee concluded hat: (1) there was no substantive difference in the formatting of the two dossiers; (2) the credentials of the external evaluators or Plaintiff and for Bellon were roughly comparable, although he overall credentials of Bellon's letter writers were perhaps lightly stronger than those writing for Sun; (3) the two cases were nearly equivalent as to classroom teaching; (4) although oth cases were somewhat below average in graduate student upervision, Bellon's case was slightly stronger because he had upervised one Ph.D. student to completion and had published ı larger number of journal articles with his students; (5) the quantity and quality for journal publications was roughly similar; (6) Bellon had a better record as to invited resentations, particularly those that were international in cope; (7) Bellon had a significantly better record of research unding; (8) the strength of the external evaluation letters was similar for both Sun and Bellon; and (9) the level of service in he two cases was comparable and satisfactory. The Committee concluded that the cases of Bellon and Sun were very similar in many categories, but Bellon's case was stronger in the areas of visibility, number of students graduated, impact of recent work, and record of research funding. It stated that there were no areas where Sun's case was superior to Bellon's and also concluded hat the process by which the faculty arrived at their decision was reasonable.

After receiving the report, Dean Daniel conducted his own review of Sun's dossier, and he agreed with the

Committee's evaluation. On July 21, 2003, Dean Daniel sent a letter to Provost Herman explaining the procedures followed in reviewing Sun's case after the FAC's report. Daniel informed Herman that his own reassessment of the Sun's case convinced him that he "does not meet the expectations for promotion and tenure in the College of Engineering." That same day, Herman wrote to Sun, informing him that a letter of nonreappointment would be forthcoming.

In August 2003, the Chairman of the FAC informed Provost Herman that two members of the College Promotion and Tenure Committee had also been members of the Grievance Committee that considered Sun's appeal. In an abundance of caution, Herman agreed to appoint an ad hoc committee at the University level to review the case. Herman selected the ad hoc committee and Sun found the proposed group acceptable. On October 14, 2003, Herman sent a letter to each of the members of the ad hoc committee. Herman enclosed a copy of Sun's dossier that included Robertson's comments. Herman also enclosed additional material Sun provided updating his dossier. He asked the ad hoc committee to determine whether the unfavorable recommendation was justified on the merits of the case or warranted higher levels of review. The ad hoc committee did not review the additional letters received following the initial Department vote. Charles Tucker, a member of the ad hoc committee, stated in an affidavit that, in his three years on the Campus Promotion and Tenure Committee, he had the opportunity to review hundreds of dossiers for tenure candidates. Although Tucker and other committee members read Robertson's attached comments and considered them, Tucker said the comments were but one of several factors, and not the most important factor, in his evaluation of Sun's dossier. Instead, the discussions of the ad hoc committee "centered around the quality of the work of Professor Sun as reflected in his dossier with updates, and the traditional factors of service, teaching and research which are

the bases for making determinations about tenure." Based upon his evaluation of the dossier and the other materials provided by Sun, Tucker thought he "was not deserving of tenure in the Materials Science and Engineering Department, one of the top two or three departments in the United States." The vote of the ad hoc committee was 3-1 against granting Plaintiff tenure.

On November 7, 2003, Provost Herman wrote a letter to Sun affirming the negative recommendation and recommending nonreappointment. On November 19, 2003, Sun appealed to Chancellor Nancy Cantor, complaining of procedural irregularities. The FAC also wrote to Chancellor Cantor and Herman to record their continuing concerns with the procedures followed. On November 24, 2003, Herman wrote Chancellor Cantor a four-page letter regarding the "long history" of Sun's case. In December 2003, Sun advised Herman that his list of 21 conference proceedings was not included in the dossier that was provided to the ad hoc committee. Herman thought that conference proceedings were not a significant part the dossier and their presence or absence was insignificant. Weaver, Daniel, Robertson, Averback and Greene all agreed that conference proceedings were not a significant part of the dossier. Even, Jian Ku Shang, Trudy Kriven, and James Economy, faculty members who were very supportive of Sun's tenure and felt that Sun was unfairly denied tenure, agreed that conference proceedings were not an important part of the dossier. On December 8, 2003, Chancellor Cantor wrote to Sun, advising him that she found no grounds for reversing the tenure decision.

On January 12, 2004, Sun filed his amended complaint in this case, alleging employment discrimination in violation of Title VII of the Civil Rights Act as well as violations of his rights under 42 U.S.C. § 1981 and 42 U.S.C. § 1983. During the discovery phase, Sun had a difficult time obtaining answers to interrogatories from the defendants, which resulted in two

orders to compel discovery as well as sanctions. Upon granting a third motion to compel, the district court entered a default judgment against the defendants. Soon after, the defendants engaged new counsel and moved the court to vacate the default judgment, arguing, among other things, that their former lawyer's medical condition prevented him from complying with discovery and that the defendants' other attorney and the defendants themselves were unaware of the situation. Although the court expressed skepticism about the reasons offered by the defendants, it granted the motion to vacate. After discovery closed, the defendants moved for summary judgment and the court granted it on all counts. Sun appeals both the vacation of the default judgment and the entry of summary judgment.

II. DISCUSSION

Sun presents three primary arguments on review. First, he claims that the court abused its discretion when it vacated the entry of default judgment against the defendants. Second, Sun contends that issues of material fact remain as to whether he was denied tenure on the basis of race or national origin. Finally, he argues that the district court erred in granting summary judgment in favor of the defendants on his First Amendment claim.

A. Default Judgment

On June 23, 2005, the district court granted Sun's third motion for sanctions, striking the pleadings of all defendants, defaulting them, and allowing Sun to proceed to trial on damages only. Then, on August 8, 2005, it granted defendants' Motion to Vacate Default Judgment. Sun claims that the court abused its discretion when it granted the motion, and he asks this Court to reverse the judgment of the district court, reinstate the defaults entered against all defendants, and remand this cause for trial on damages only. In order to have an entry of

default vacated, the moving party must show: (1) good cause for the default; (2) quick action to correct it; and (3) a meritorious defense to the complaint. Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc., 28 F.3d 42, 45 (7th Cir. 1994). Whether or not to vacate a default is in the sound discretion of the district court, and we will reverse such a determination only if the district court abused its discretion. See Robinson Eng'g Co. Pension Plan and Trust v. George, 223 F.3d 445, 448 (7th Cir. 2000).

In their Motion to Vacate Default Judgment and their memorandum accompanying it, defendants' new counsel offered a litany of excuses. They asserted that the defendants were personally innocent of any misconduct; that the district court should have given the individual defendants direct notice of the earlier sanctions; that they had a complete defense and should be allowed to present it; that the court's interest in deciding cases on the merits would best be served by vacating the defaults; and that one of the defendants' prior attorneys had medical conditions which interfered with his ability to manage the defense of the case.

One of the defendants' attorneys, Michael Cornyn, stated in his affidavit that he was in charge of coordinating and finalizing the discovery compliance of all defendants, and the defendants fully cooperated. Although he informed University Counsel of the first Motion to Compel and attendant sanctions, he did not inform them of the second or third. Moreover, he stated that he had been diagnosed recently as suffering from "two serious conditions" that had lasted at least for six months. A letter from Cornyn's treating doctor was produced under seal. Cornyn stated his belief that the medical conditions from which he suffered interfered with his ability to properly manage the defense to the defendants' detriment. William J. Brinkman, the other attorney of record for the defendants, swore that he had no personal knowledge of the second or third motions to compel.

Another attorney, Mark Henss of the University's Office of University Counsel, likewise swore that he had no knowledge fo the second or third motions.

Sun challenged the excuses, first pointing out that the individual defendants had not even printed out some requested documents until after the default judgment was entered. Moreover, Sun noted that Cornyn's behavior was not out of character for him, because he had handled discovery requests in a similar fashion in another case, which also resulted in the entry of a default judgment against his client. See Robinson v. City of Champaign, Case No. 00-CV-2315 (C.D. Ill. 2002) (defendant's failure to provide answers to written interrogatories for more than six months resulted in default judgment). Sun also cited Tango Music, LLC v. DeadQuick Music for the proposition that an attorney's illness (in that case, depression) did not excuse his client from proceeding with a case. 348 F.3d 244, 247-48 (7th Cir. 2003). In Tango, we recognized that a client has "to take responsibility for the actions of is agents, including the lawyers whom it hires." Id. at 247. Finally, Sun pointed out that Brinkman had registered with the Electronic Case Filing System of the Central District of Illinois so that he received an electronic copy of each and every motion, order, and docket entry in this case.

In its opinion filed on August 8, 2005 the district court quickly disposed of defendants' contention that the court should have given them direct notice of their counsel's failures, calling it "completely outrageous." Sun v. Bd. of Trs. of the Univ. of Ill., 229 F.R.D. 584, 590 (C.D. Ill. 2005). It also found that the individual defendants were not innocent of misconduct, because they "did not provide documents and answers to interrogatories until months and months after the deadline." Id. The court also expressed reservations about whether Cornyn's conduct was the result of his alleged medical conditions, noting the remarkable resemblance between the present case and the Robinson case.

:d. Moreover, the court said, that "Brinkman's claims of lack of cnowledge ring hollow." Id. In short, the court concluded, 'Defendants have not convinced this Court that the entry of default judgment was not warranted in this case." Id. at 591. Nonetheless, it added that "as much as [the] court finds all of :hese arguments lacking in merit, it does have an interest in aaving cases decided on the merits and concludes that sanctions esser than default may be appropriate in this case." Id. It then granted the defendants' Motion to Vacate Default Judgment, out ordered serious sanctions against defendants' (former) attorneys.

Sun is likely correct that a district court abuses its discretion when it vacates a properly entered default judgment absent an explicit finding that the party seeking to vacate the udgment showed good cause for the default. After all, the anguage of our case law is mandatory, stating that a party seeking to vacate a default judgment must make the required showings. See Pretzel & Stouffer, 28 F.3d at 45. Unfortunately, both parties gloss over the antecedent issue of whether the entry of default judgment was proper in the first place. Federal Rule of Civil Procedure 55(a) provides that "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules . . . the clerk shall enter the party's default." We conclude that default udgment was an unduly harsh sanction in this case.

This Circuit has a well established policy favoring a trial on the merits over a default judgment. C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984) (collecting cases). For that reason, a default judgment should be used only in extreme situations, or when other less drastic sanctions have proven unavailing. Id. Although a district court has the default judgment "readily available within its arsenal of sanctions," id. at 1206, it is a weapon of last resort, appropriate only when a party wilfully disregards pending

litigation. See, e.g., id. at 1204 (district court would not vacate default where it concluded that defendants "believed they could ignore this case and throw themselves upon the mercy of the court by contending that their local counsel was incompetent"); Calumet Lumber, Inc. v. Mid-America Indus., Inc., 103 F.3d 612 (7th Cir. 1997) (holding that entry of default judgment was proper where counsel knowingly skipped a hearing and failed to answer a crossclaim altogether); Pretzel v. Stouffer, 28 F.3d at 44 (holding entry of default proper where party did not file its answer or attend a status hearing).

As the district court likely realized when it vacated its entry of default, this case does not represent one of those rare situations in which entry of default is appropriate. While defendants' attorneys were by no means paragons of responsible lawyering, their involvement in the discovery process was consistent and ongoing. Although counsel should have promptly complied with the court's orders to answer outstanding interrogatories, their delay was not so extreme as to warrant an entry of default. Likewise, although the district court tried to use less drastic sanctions by twice imposing monetary penalties, it brought out the heavy artillery too soon. Instead of entering a default, punishing the defendants and giving the plaintiff a windfall, the district court should have imposed increased monetary sanctions against the attorneys who had caused the discovery delays. Accordingly, we affirm the district court's decision to vacate its improvidently granted entry of default judgment.

B. Race/National Origin Discrimination Claim

Sun next contends that the district court improperly granted summary judgment in favor of the defendants on his Title VII claim. We review a district court's grant of summary judgment de novo. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In ruling on a motion for summary judgment, a district court has one task: to decide whether there is any material dispute of fact that requires a trial. Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994). In making this determination, we draw reasonable inferences from the underlying facts in the light most favorable to Sun. Carreon v. Ill. Dep't of Human Servs., 395 F.3d 786, 790 (7th Cir. 2005).

Sun argues that the defendants denied him promotion and tenure on the basis of his race and national origin, in violation of Title VII of the Civil Rights Act. To establish a claim of disparate treatment, a plaintiff may proceed under the direct or indirect method. We consider Sun's Title VII claims under each method.

1. Direct Method

In order to establish a prima facie case of race or national origin discrimination under the direct method, Sun must prove that the defendants were motivated by animus based upon his race or national origin when he was denied promotion and tenure. See Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902 (7th Cir. 2006); Mosley v. Maytag Corp., 2006 WL 213950, at *4 (C.D. Ill. Jan. 27, 2006). A plaintiff proceeding according to the direct method may rely on either direct or circumstantial evidence. Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 720 (7th Cir. 2005).

Sun argues that the voting record of the PTC and Greene's comment about Chinese students provide circumstantial evidence of discrimination sufficient to raise a genuine issue of material fact under the direct method.

Circumstantial evidence of discrimination is evidence which allows the trier of fact to infer intentional discrimination by the decisionmaker. Id. This Circuit has recognized three types of "circumstantial" evidence of intentional discrimination: (1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer's reason is a pretext for discrimination. Id. at 720-21. Sun's evidence falls into the first two categories. Sun emphasized that, between the years of 1993 and 2003, the four members of the PTC voted on 19 promotion candidates, two of whom were Asian and from China and 17 of whom were Caucasian. According to Sun, the PTC voted unanimously against him and the other Chinese candidate and, in almost every case, voted unanimously in favor of the Caucasian candidates.7 The district court disregarded this evidence, stating that it did not constitute "statistical" evidence that similarly situated employees outside the protected class received systematically better treatment. See Mosley, 2006 WL 213950, at *5-6. Although the sample size is insufficient to provide statistically reliable evidence, the PTC's voting pattern has some probative value regarding discriminatory employment practices. After all, Rudin recognizes pattern evidence of disparate treatment "whether or not rigorously statistical." 420 F.3d at 720. We do not hold, however, that a questionable pattern of promotion, standing alone, is sufficient evidence to withstand summary judgment.

FN. 7 The other Chinese candidate was eventually given tenure and promoted—although not by the Department.

Although Sun concedes that Greene's remark is not

direct evidence of discrimination against him because Greene referred to "students" and not "professors," he argues that it shows that Greene harbored prejudicial views about Chinese people. Moreover, Sun asserts, the suspect remark was contemporaneous with the adverse employment action because the remark occurred at the time the PTC, of which Greene was a member, was discussing Sun's case and selecting external evaluators. Defendants contend, however, that Greene's remark about Chinese students was a "stray workplace remark" that is not evidence of discrimination. We have held that stray remarks that are neither proximate nor related to the employment decision are insufficient to defeat summary judgment. Bahl v. Royal Indem. Co., 115 F.3d 1283, 1293 (7th Cir. 1997). At the same time, though, the statements of a person who lacks the final decision-making authority may be probative of intentional discrimination if that individual exercised a significant degree of influence over the contested decision. Porter v. State of Ill., Dep't of Children & Family Servs., 987 F. Supp. 667, 673 (N.D. Ill. 1997), aff'd, 165 F.3d 32 (7th Cir. 1998).

If the PTC had made the final decision in Sun's case, its voting record coupled with the discriminatory remarks of one of its four members may have created a genuine issue of material fact. We need not decide that issue, though, because we have previously held that "when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant." Willis v. Marion County Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997). As the district court noted, "the final decision in this case was made by Herman, after multiple layers of review, including the review by the ad hoc committee." Sun v. Bd. of Trs. of the Univ. of Ill., 429 F. Supp 2d 1002, 1023 (C.D. Ill. 2006). The numerous levels of review, particularly those conducted by independent and University-wide committees broke any connection between

Greene's possible discriminatory motive and the ultimate decision.

Sun claims that Greene's illicit motives infected the entire process and points to a Third Circuit case in which the court stated that "a plaintiff in a discrimination case need not prove intentional discrimination at every stage of the review process." Roebuck v. Drexel Univ., 852 F.2d 715, 727 (3d Cir. 1988). Sun's reliance on Roebuck is misplaced, however, because each evaluator in that case considered reports from the previous evaluators, thus tainting subsequent reviews and leaving the causal chain in tact. Id. By contrast, in Sun's case, subsequent reviewing committees had no report from the PTC committee that could have tainted their reviews or ultimate decisions. In addition, Sun's case is distinguishable from Russell v. Bd. of Trs. of Univ. of Ill. at Chicago, in which we concluded that the improper motives of the plaintiff's supervisor "had to be imputed to the other members of the disciplinary committee because of [the supervisor's] extensive role in initiating and carrying out the disciplinary process." 243 F.3d 336, 342 (7th Cir. 2001). Again, given the numerous reviews, both substantive and procedural, by committees outside of the Department and far removed from Greene's alleged influence, Greene could not be said to have an "extensive role" in making the tenure decision. Therefore, Greene's possibly improper motives cannot be imputed to the final decisionmaker. Accordingly, the district court correctly determined that no genuine issue remained with regards to Sun's direct method claim.

2. Indirect Method

Sun also attempts to show that issues of fact remain under the McDonnell Douglas indirect method. Under this method, Sun must first establish a prima facie case of discrimination by showing that: (1) he is a member of a

protected class; (2) he was qualified for tenure; (3) he was denied tenure; and (4) a similarly situated applicant not in the protected class was granted tenure. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Namenwirth v. Bd. of Regents of Univ. of Wis. Sys., 769 F.2d 1235, 1240 (7th Cir. 1985); Sinha v. Bd. of Trs. of Univ. of Ill., 2001 WL 921718, at *14 (N.D. Ill. Aug. 15, 2001). If Sun establishes a prima facie case, the burden of production shifts to the defendants to articulate a nondiscriminatory reason for denying Sun's tenure. See Namenwirth, 769 F.2d at 1240. If the defendants produce a nondiscriminatory reason for the decision, Sun must then prove that the stated reason is merely a pretext for discrimination based upon race and national origin. Id. This is an extremely difficult burden to carry "[d]ue to the layered and subjective nature of the tenure process, and the courts' recognition that such decisions are based on the fine 'distinction between competent and superior achievement.' " Sinha, 2001 WL 921718, at *14, quoting Kuhn v. Ball State Univ., 78 F.3d 330, 331 (7th Cir. 1996).

With respect to the prima facie case of discrimination, it is undisputed that Sun is Chinese and was subject to an adverse employment action, i.e., the denial of tenure and promotion. As usual, it is the second and fourth prongs that are at issue. Because the second prong is inextricably intertwined with the pretext analysis, we address prong four first—the identification of similarly situated individual who was treated more favorably. Sun identifies Pascal Bellon as a similarly situated, non-Chinese tenure candidate who was promoted and granted tenure. Bellon was in the same department as Sun and was a candidate for promotion and tenure one year before Sun. The FAC committee found that "different and more exacting procedures and standards were applied" in Sun's case, which could satisfy the fourth prong of the prima facie case. On the other hand, the College Promotion and Tenure Committee actually conducted a detailed comparison between Bellon and

Sun, concluding that Bellon's dossier was superior to Sun's in a number of ways, including funding and invited presentations. That comparison identifies differences between the candidates, but does not necessarily show that they were not at least "similarly situated."

Assuming that Sun could, in fact, establish a prima facie case, the defendants have articulated a non-discriminatory reason for denying him tenure that is not pretextual. Specifically, they contend that Sun's dossier was simply inadequate, and multiple groups and individuals determined that he did not deserve tenure. This court has recognized that tenure cases require something more than mere qualification; the department must believe the candidate has a certain amount of promise. Namenwirth, 769 F.2d at 1242. Given the nuanced nature of such decisions, we generally do not "second-guess the expert decisions of faculty committees . . . ." Vanasco v. Nat'l-Louis Univ., 137 F.3d 962, 968 (7th Cir. 1998).

In this case, the University's proffered reason is nondiscriminatory, as it identifies weaknesses in Sun's dossier related to funding, scholarship, and supervision of graduate students. We know that the proffered reason is legitimate and not pretextual because Sun's dossier was considered numerous times by multiple committees, 8 This claim is primarily against Weaver, although Sun makes some allegations against Robertson. including committees that had no interaction whatsoever with Greene, Weaver, or Averback. Ultimately, the indirect method of proving discrimination attempts to isolate the cause of an adverse employment action in order to determine whether it was motivated by discrimination. Where, as here, a plaintiff is afforded process sufficient to eliminate potentially discriminatory motives, summary judgment in favor of the defendants is proper. Although some of the defendants' actions early in the process may have caused Sun to lose faith in the fairness and integrity of the University's tenure and

promotion decision, no reasonable jury could find that the final decision was based on Sun's race or national origin. To hold otherwise would discourage employers from identifying and correcting potentially unfair or discriminatory employment proceedings without legal intervention.

C. First Amendment Claim

Sun's final claim is that the individual defendants violated his First Amendment right to free speech, and that he was retaliated against for asserting those rights. 8 Specifically, he claims that his selection of the recipient of the teaching award constituted protected speech, as did his subsequent grievance against Weaver. To establish such a claim, Sun must show that 1) his speech was constitutionally protected and 2) that speech motivated the defendants' actions. Vukadinovich v. Bd. of Sch. Trs. of N. Newton Sch. Corp. 278 F.3d 693, 699 (7th Cir. 2002). If Sun establishes these two elements, the burden shifts to the University to show that its interest in efficient management outweighed Sun's interest in freedom of expression, or that it would have denied Sun tenure regardless of the speech. Miller v. Jones, 444 F.3d 929, 935 (7th Cir. 2006).

Employee speech is protected when it relates to matter of "political, social, or other concern to the community." Id. This Court considers the content, form, and context of employee speech to determine whether it is on a matter of public concern, with the primary emphasis on content. Id. The defendants contend that Sun's decision not to nominate Weaver for the award was not speech on a matter of public concern. In response, Sun notes that educational improvement in public schools is a matter of public concern, citing Klug v. Chicago Sch. Reform Bd. of Trs., 197 F.3d 853, 858 (7th Cir. 1999). He also asserts that his complaint to the FAC about Weaver's behavior was protected speech. The district court noted that this

was a close question, but found the speech protected. We need not decide this question, however, because Sun's speech did not motivate the denial of tenure, and it is clear that the Department would have denied Sun's tenure regardless of his speech.

The district court noted that even if Weaver took retaliatory actions against Sun and attempted to influence the faculty regarding Sun's tenure and promotion, there is no evidence that anyone was actually influenced. Sun disagrees, stating that Weaver's influential position as Department Head and his attempts to exert that influence constitute circumstantial evidence that he influenced the vote. Although a reasonable jury could conclude that Weaver influenced some faculty members, the numerous subsequent reviews by independent decision makers once again break any causal chain between any retaliatory conduct and the ultimate decision not to promote Sun. Regardless of Weaver's alleged improper behavior, committee after committee found Sun's qualifications unworthy of tenure and promotion. Therefore, it cannot be said that Sun's speech motivated the decision.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment on all counts.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

Appendix E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 14, 2007

Before

Hon. JOEL M. FLAUM, *Chief Judge*
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERRENCE T. EVANS, *Circuit Judge*

No. 06-2438

YONG-QIAN SUN, *Plaintiff-Appellant,*

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, RICHARD HERMAN, DAVID E. DANIEL ET AL., *Defendant-Appellee.*

Appeal from the United States District Court for the Central District of Illinois. No. 03 CV 2221
Michael P. McCuskey, *Chief Judge*

ORDER

On consideration of the petition for rehearing en banc filed by plaintiff-appellant in the above case on January 30, 2007, no judge in active service has requested a vote thereon and all of the members of the original panel have voted to deny the petition for rehearing. The petition is therefore DENIED.

(2)

No. 06-1339

FILED
MAY 07 2007

IN THE

Supreme Court of the United States

YONG-QIAN SUN,

Petitioner,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS; RICHARD HERMAN; DAVID E. DANIEL; ROBERT AVERBACK; JOHN H. WEAVER; IAN M. ROBERTSON; and JOSEPH E. GREENE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

Brief For Respondents In Opposition To Petition

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BEST AVAILABLE COPY

QUESTION PRESENTED

Is the Petitioner, whose initial unsuccessful application for tenure was re-evaluated and rejected on five separate occasions following independent reviews at the departmental, college, and campus levels at the University of Illinois - reviews which were specifically alert to and mindful of allegations of impropriety in the initial evaluation - nevertheless entitled to claim that alleged animus against him in the original superseded determination somehow influenced his unsuccessful application for tenure?

Was it error for the Seventh Circuit to affirm the holding of Judge McCuskey that the Petitioner's claims against the Board of Trustees should be considered on the merits?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

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INTRODUCTION

Petitioner presents no compelling reason for his Petition for a Writ of *Certiorari* ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioner fails to demonstrate that the Seventh Circuit's January 16, 2007 Order ("Order") is in conflict with a decision of this Court or another Court of Appeals, or that the Seventh Circuit decided an important federal question that has not already been settled by this Court. *See id.* at 10(a)-(c). The Petition should therefore be denied.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

I. Background

The Department of Materials Science and Engineering, a department in the College of Engineering at the University of Illinois, is one of the top departments in one of the top colleges of engineering in the United States. In the Summer and Fall of 2002, the Petitioner was considered for tenure in that department. (Pet. A77). On October 2, 2002, the tenured members of the department, voting by secret ballot, recommended that the Petitioner not receive tenure. (Pet. A81). Petitioner's appeal resulted in a second departmental vote on October 30, 2002, recommending again against tenure (although this vote was 9 - 9, anything more than one or two negative votes is considered to be fatal to the applicant's hopes for obtaining tenure). (Pet. A81 - A82).

Based upon that negative recommendation of the faculty, Department Head John Weaver recommended to the Dean of the College and the Provost of the University, that the application for tenure be denied.

Petitioner appealed the result, alleging that bias by Weaver had unfairly influenced the decision, and asserted other irregularities as well. (Pet. A83). Following an internal investigation, the University determined that there was a possibility that the application of the Petitioner was not fairly considered. As a consequence, his application was reconsidered at all levels. Pet. A84 - A86). At the time of the reconsideration, John Weaver was no longer the department head, and did not participate in or vote on the reconsideration of the Petitioner's application. (Pet. A84).

In July, 2003, the department (minus Weaver) voted following a renewed discussion, again rejecting the Petitioner. (Pet. A86). Ian Robertson, the new department head, recommended against tenure. (Pet. A86). The reasons given by Robertson, in addition to the negative vote of the faculty, were stated in his report and were essentially identical to the criticisms which had been given to the Petitioner in his performance evaluation in 2001, a year before his tenure application. It was Professor Robertson's opinion that the shortcomings which had been noted the previous year had not been remedied. (Pet. A86 - A87).

Upon receipt of a negative recommendation from Robertson, David Daniel, Dean of the College of Engineering, submitted the Petitioner's dossier to the College Promotion and Tenure Committee for an independent review of the merits of his application. (Pet. A87). The College Promotion and Tenure Committee determined that the department's recommendation was consistent with prior determinations by the same department. (Pet. A87 - A88). Dean Daniel conducted yet another independent evaluation of the Petitioner's dossier, and also determined it was insufficient to merit tenure at this prestigious department. (Pet. A88 - A89).

Richard Herman, Chancellor of the University, conducted a final independent evaluation of the dossier; he formed an independent ad hoc committee at the college level, membership of which was approved by the Petitioner, to review the dossier yet again. (Pet. A89). This committee likewise recommended against tenure. (Pet. A89 - A90). The Chancellor, relying on the committee's recommendation, denied tenure to the Petitioner. (Pet. A90).

The reconsiderations of the Petitioner's tenure application at the departmental level (twice), the college level (twice), and the campus level (once) were all taken with a view to ensuring that no bias of any individual crept into the determination. Each of these independent evaluations recommended against tenure.

II. Default Judgment

In the Court's April 6, 2005 Order following the second motion to compel compliance, Judge Bernthal indicated that the Defendants faced the possibility of a default if they did not "participate in the discovery process." Subsequently, the court entered a default. It was not the case, however, that Respondents had not participated in the discovery process. At the time the default was entered, the following discovery compliance had been provided:

Averback	Answers to Interrogatories
Board of Trustees	Response to Request to Produce
Daniel	Response to Request to Produce
Green	Response to Request to Produce
Herman	Answers to Interrogatories
	Response to Request to Produce (except for curriculum vitae)
Robertson	Answers to Interrogatories

	Response to Request to Produce
Weaver	Answers to Interrogatories
	Response to Request to Produce

Jointly, the Defendants had produced over 2,700 pages of documents and had answered four of the seven sets of Interrogatories propounded.

Thus, although the discovery was not complete at the time that Judge McCuskey entered the default, there had been substantial compliance with the numerous discovery requests which had been sent to the Defendants. It was in light of that compliance that the Seventh Circuit noted in its decision that it had been an abuse of Judge McCuskey's discretion to enter the default judgment rather than imposing further sanctions.

III. Departmental Promotion and Tenure Committee

The Petitioner has asserted that the Departmental Promotion and Tenure Committee routinely voted to approve white applicants for tenure, and voted against the only Chinese applicant. (Pet. 3). This statement, while true as far as it goes, is quite misleading.

First, it should be noted that only a single Chinese applicant for tenure was considered by the committee prior to 2001, and that applicant ultimately received tenure from the University. Moreover, for most of the history of the department, the faculty recommendations on tenure were made by the Promotion and Tenure Committee, which consisted of four faculty members who evaluated the tenure applicants and made their recommendations to the department head. (Pet. A34). This was changed in 2001 by John Weaver, who required a vote of the tenured faculty of the entire department, 18 or 19 in all. (Pet. A34). The Petitioner was only the second tenure

applicant to be considered under the new vote, and only the first applicant of Chinese origin. (Pet. A34).

It was for these reasons that the circuit and appellate courts determined that there was no permissible inference to be drawn from prior faculty votes. (Pet. A57, A97).

It should also be noted that since the Petitioner's application, there have been two additional faculty members of Chinese origin who have been considered for tenure. Both applicants have received tenure.

IV. Joseph Greene

Joseph Greene was 1 of 18 voting faculty members in the department. He participated in faculty discussions and had 1 of 18 votes on each occasion that the Petitioner's application was considered at the departmental level. Greene had no input into the independent considerations at either the college or the campus level, and there is no evidence that Greene's opinion was even known to the individuals involved in those decisions.

V. External Evaluators

The external evaluators were chosen by Robert Averback; in the course of the internal review which determined that there might have been some unfairness in the initial application process, that same committee specifically found that there was no impropriety in the selection of the external evaluators. (Pet. A78, A85).

VI. Inaccuracies in Petitioner's Dossier

Petitioner's assertion (Pet. 6) that "20 some research publications had been deleted from his promotion dossier" is

inaccurate. The dossier inadvertently omitted conference proceedings in which the Petitioner was involved, not research publications. Conference proceedings are not peer reviewed and are generally considered to be of no significance in evaluation of a dossier. Long before the Petitioner's candidacy, the department was on record (in evaluation of another tenure candidate) as stating, "Conference proceedings . . . are not rigorously refereed nor extensively read [and] count little (or even negatively) towards scientific and intellectual progress." This very point was commented upon to the same effect in *Sinha v. Board of Trustees of the University of Illinois*, No. 98 C 7275, 2001 WL 92178 at *3 (N.D. Il. 2001), where the Plaintiff in that case was advised, "I would like to point out to you that conference presentations . . . are not counted in any performance/tenure/promotion evaluation."

REASONS FOR DENYING THE PETITION

I. Most courts of appeal are not in genuine conflict on the issue of subordinate bias liability; in any event, this case is not a proper vehicle for considering that issue because resolution of that issue would not alter the outcome.

Petitioner contends that there is a conflict among the courts of appeals concerning the appropriate standard for subordinate bias liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Although there is a circuit conflict on that issue, that conflict is not as extensive as Petitioner asserts. In any event, whether the record is evaluated under the legal analysis applied by the district court and the court of appeals, or under the alternative analysis from other circuits cited in the petition, the undisputed material facts do not permit a finding of unlawful employment discrimination. Accordingly, this case does not present a vehicle for

considering the legal question posed in the petition, since resolution of that issue would not alter the outcome.

Under Title VII, it is unlawful for an employer, *inter alia*, to "discharge any individual ... because of such individual's race." 42 U.S.C. 20003-2(a)(1). All courts of appeal to have considered the issue have held that an employer can be liable under Title VII based on the alleged bias of a subordinate employee. In determining whether an employer should be held liable on a theory of subordinate bias, most courts of appeal, as did the court here, have focused on the causal connection between the alleged bias and the adverse employment action. *See Collins v. New York City Transit Authority*, 305 F.3d 113, 119-20 (2d Cir. 2002) (holding that the plaintiff failed to establish a *prima facie* case of race discrimination, where he offered insufficient evidence of "causation linking" subordinate's discriminatory animus to decision to terminate by "independent, neutral, and unbiased adjudicator"); *Russel v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (stating that the court "look[s] to who actually made the decision or caused the decision to be made, not simply to who officially made the decision.); *Wilson v. Stoh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (stating that "[t]he determinative question is whether [the plaintiff] has submitted evidence that [the subordinate employee's] racial animus was a cause of the termination"); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (asserting that the relevant inquiry was whether there was a "causal link between [the subordinate's] prejudice and [the] discharge"); *DeHorney v. Bank of Am. Nat'l Trust & Savs. Ass'n*, 879 F.2d 459, 467 (9th Cir.1989) (holding that the plaintiff had failed to make out a prima facie case of race discrimination, when there was no evidence to establish a nexus between the subordinate's racial slur and the superior's decision to terminate); *E.E.O.C. v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006) (stating that the issue in a

subordinate bias claim is "whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action."); *Stimpson v. City of Tusculoosa*, 186 F.3d 1328, 1331 (11th Cir. 1999) (noting that "the plaintiff must prove that the discriminatory animus behind the recommendation ... was an actual cause of the other party's decision to terminate the employee"), *cert denied*, 529 U.S. 1053 (2000).

Although those courts of appeal have phrased the relevant inquiry in various ways, the thrust of the inquiry in every case is whether there was a causal connection between the alleged bias and the adverse employment action.

Petitioner contends that the courts of appeal are "divided in two groups" on the standard for subordinate bias liability, and refers to them as the "influence group" and the "cause group." Pet. 15. Petitioner places the Second, Third, Fifth, and Ninth Circuits in the "influence group,"and the Fourth, Seventh and Eleventh Circuits in the "cause group." Pet. 15, 17-18. However, those courts do not appear to be in genuine conflict with each other because the slightly different formulations used by those courts would not necessarily lead to different results in any given case. Indeed, many of those courts have used different formulations interchangeably – even in the course of a single opinion. *See e.g. Russell*, 235 F.3d at 227 (framing the inquiry as whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker," but "look[ing] to who actually made the decision or caused the decision to be made"); *Shager*, 913 F.2d 405 (asserting that the relevant inquiry was whether there was a "causal link between [the subordinate's] prejudice and [the] discharge," but proceeding to assess whether the adverse employment action was "tainted" or "influenced" by the subordinate's prejudice).

The Petitioner's grouping of the Fourth, Seventh and Eleventh circuits in a single group is not accurate; indeed, in *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004), the court expressly rejected the Fourth Circuit's approach in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) as "inconsistent with the normal analysis of causal issues in tort litigation." The Tenth Circuit has also expressly rejected *Hill. BCI Coca-Cola Bottling Co.*, 450 F.3d at 487. Indeed, it appears that a majority of the courts of appeal conflict with the Fourth Circuit's decision in *Hill.* See, e.g., *Hill*, 354 F.3d at 303 (Michael, J., dissenting) (citing cases from different circuits in opposition).

To the extent that *Hill* is clearly at odds with the other circuits on this issue, it would impose a higher duty on the Petitioner than does the Seventh Circuit, or indeed any of the other circuits on this issue. This case is thus not a proper vehicle for resolving that conflict, because it would not be outcome determinative.

Here, as the district court and the court of appeals noted, "the final decision in this case was made by [Provost Richard] Herman, after multiple layers of review, including the review by the ad hoc committee." Pet. A59, A98. Accordingly, the district court and the court of appeals found, "the numerous levels of review, particularly those conducted by independent and University-wide committees broke any connection between [Joseph] Greene's possible discriminatory motive and the ultimate decision." Pet. A98-A99. The district court and the court of appeals relied on the court of appeals holding that "when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant." Pet. A60, A98 *citing Willis v. Marion County*

Auditor's Office, 118 F.2d 542, 547 (7th Cir. 1997). Whether the record is evaluated under the legal analysis applied by the district court and the court of appeals, or under the alternative analysis from other circuits cited in the petition, the undisputed material facts do not permit a finding of unlawful employment discrimination. *See, e.g., Collins*, 305 F.3d at 119-20 (2d Cir. 2002) (holding that the plaintiff failed to establish a *prima facie* case of race discrimination, where he offered insufficient evidence of "causation linking" subordinate's discriminatory animus to decision to terminate by "independent, neutral, and unbiased adjudicator"); *Long v. Eastfield Coll.*, 88 F.3d 300, 306-07 (5th Cir. 1996) (noting that, if final decisionmaker based decision on independent investigation, causal link between subordinate's retaliatory motive and plaintiff's termination would be broken); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640, n. 9 (9th Cir 2003) (finding that the plaintiff had not shown the necessary nexus because decisionmaker conducted her own thorough investigation, citing *Willis*, 118 F.2d 542, 547 and *Long*, 88 F.3d at 306-07). Thus, under any standard, the Petitioner cannot prevail.

II. The Seventh Circuit's Decision is not in Conflict with *Price Waterhouse v. Hopkins*.

Petitioner correctly notes (Pet. 18) that the court did not make reference to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); however, the court did reference and distinguish two other cases relied on by Petitioner, *Roebuck v. Drexel Univ.*, 852 F.2d 715 (3d Cir. 1988) and *Russell v. Bd. of Trs. Of Univ. of Ill. at Chicago;* 243 F.3d 336 (7th Cir. 2001), and the court's analysis regarding these two cases is equally applicable to *Price Waterhouse*.

As with *Roebuck* and *Russell*, Petitioner's reliance on *Price Waterhouse* is misplaced. In *Price Waterhouse*, the

partnership solicited evaluations from all the firm's partners, some of the partners' comments were the product of sexual stereotyping, and the Policy Board "*relied very heavily*" on such evaluations in making its decision. 490 U.S. at 256 (emphasis added). "By contrast, in [Petitioner's] case, subsequent reviewing committees had no report from the [Promotion and Tenure Committee] that could have tainted their reviews or ultimate decisions" (Pet. A99), and, indeed reviewed the Petitioner's case with the specific intent of conducting a *de novo* review in order to eliminate any alleged bias in the initial evaluation of Petitioner's case.

III. The Seventh Circuit Decision does not Create a "Conflict with the Law Requiring that Internal Administrative Remedies be Exhausted."

In this case, Petitioner did not suffer an "adverse employment action" until he pursued and was granted his appeal, received numerous independent reconsiderations of his application, received a final decision from Provost Herman regarding his application for tenure. Petitioner argues that the court of appeals' decision "conflicts" with this requirement because by pursuing his appeal, he established multiple layers of review; thereby, ensuring that Provost Herman was insulated from Greene's alleged bias. (Pet. 4 - 6). Petitioner misconstrues the court of appeals' decision. Contrary to Petitioner's contention, the court of appeals did not hold that employers may evade liability for Title VII claims *simply* by establishing multiple layers of review for employment decisions.. The court recognized, as it has in the past, and as other courts of appeal have done, that an employer can be liable under Title VII based on the alleged bias of a subordinate employee, if the plaintiff can present sufficient evidence of a causal relationship between the alleged bias and the adverse employment action. This Petitioner failed to do so. The court of appeals rightly found

that the "the numerous levels of reviews, particularly those conducted by independent and University-wide committees broke any connection between Greene's possible discriminatory motive and the ultimate decision." Pet. A98-A99.

IV. The Seventh Circuit's Decision does not Create a Conflict with Other Circuits Over the Meaning of Good Cause for Vacating a Default Judgment.

Contrary to Petitioner's assertion, the court of appeals did not consider the meaning of "good cause" for vacating a default judgment. Rather, it decided "the antecedent issue of whether the entry of default was proper in the first place", and concluded that "default judgment was an unduly harsh sanction in this case." Pet. A94. The court did not affirm the district court's decision to vacate the default because it found that Respondents had shown good cause; it did not address that issue. Rather, it affirmed the district court's decision because it found that the district court had "improvidently" granted entry of default judgment in the first place: "[I]nstead of entering a default, punishing the defendants and giving the plaintiff a windfall, the district court should have imposed increased monetary sanctions against the attorneys who had caused the discovery delays." Pet. A95.

V. The Seventh Circuit's Decision is not in Conflict with this Court's Decision in National Hockey League.

In *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), the district court dismissed the action for the hockey club's failure to answer written interrogatories. The Court of Appeals for the Third Circuit reversed, and this Court reversed the judgment of the Court of

Appeals and restored the District Court's ruling. 427 U.S. at 639, 643.

As this Court noted, "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *Id.* at 642. This Court noted that dismissal is an "extreme" sanction, and concluded that the district judge did not abuse his discretion in finding that dismissal was appropriate under the circumstances of the case. *Id.* at 643.

In this case, the district court vacated its entry of default, and the court of appeals affirmed, finding that the district judge did not abuse his discretion in doing so. The court of appeals concluded "that default judgment was an unduly harsh sanction in this case", and believed that the district judge "likely realized [that] ... this case [did] not represent one of those rare situations in which entry of default is appropriate." Pet. A94 - A95.

The fact that in *National Hockey League*, the district court found that dismissal was an appropriate sanction, and that this Court found that the district court did not abuse its discretion, does not mean that in this case, the district court abused its discretion in finding differently. The court of appeals' decision in this case does not conflict with *National Hockey League*.

VI. The Seventh Circuit has not Applied a More Lenient Standard Towards Defendants than Plaintiffs in Rendering Default or Dismissal as a Discovery Sanction.

Petitioner cites *Williams v. Chicago Bd. of Ed.*, 155

F.3d 853 (7th Cir. 1998) and *In re: Thomas Consolidates Industries, Inc.*, 456 F.3d 719 (7th Cir. 2006) as examples of the court of appeals applying a more strict standard to plaintiffs than that applied to the Respondents in this case. This is a misinterpretation of those holdings.

Williams involved dismissal of a case *sua sponte* for want of prosecution. 155 F.3d at 856-57. *Williams* is also distinguishable because, contrary to Petitioner's representation, it involved significantly more than violation of a discovery order:

> Williams' attorneys clearly tested the judge's patience. Their lack of respect for the rules of litigation and the court's scheduled deadlines was manifest from the case's inception, beginning with their failure to serve the defendants in a timely fashion and their utter disregard for Rule 26's mandatory disclosures. And there was no improvement as the case progressed. Among other things, Williams' counsel missed the deadline to respond to the Board's motion to dismiss; failed to respond to the Board's basic discovery requests and then, after being ordered to respond by a certain date, missed that deadline as well; failed to submit a draft pretrial order and proposed jury instructions to the defendants by the court-scheduled deadline; and then neglected even to appear in court for the scheduled hearing to submit the pretrial order and jury instructions that should have been finalized by that date.

Id. at 858.

In re: Thomas Consolidated Industries, Inc. also involved more than "violating one discovery order." Counsel also lied about when and how he tendered the discovery responses, and repeated the same non-responsive, inadequate answers that the bankruptcy court expressly warned him were unacceptable. The court of appeals found counsel's conduct to demonstrate the bad faith finding that justified dismissal. 456 F.3d at 726.

Williams and *In re: Thomas Consolidated Industries, Inc.* are not examples of a more strict standard applied to plaintiffs; rather, the cases are examples of the broad discretion afforded to district court judges to determine what discovery sanctions are appropriate in any given case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

Yong-Qian Sun, Petitioner

v.

Board of Trustees of the University of Illinois, et al, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Reply Brief of Petitioner

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ARGUMENT

A. Respondents Rephrased the Questions in Violation of the Rules of This Court

In their Brief in Opposition to the Petition, Respondents rephrased the questions in violation of the Rules of the Supreme Court.

Rule 14.1(a) of the Rules of the Supreme Court of the United States requires that the questions presented for review "should not be argumentative."

Respondents' rephrased Question 1 is blatantly argumentative. In rephrasing this question, Respondents stated that the reviews of the decision to terminate Petitioner were "independent", that the reviewers were "alert" and "mindful" of the allegation of impropriety, and that the termination decision was "reevaluated and rejected on five separate occasions." Insertion of these argumentative elements into the questions is in violation of Rule 14.1(a) of this Court.

Respondents' rephrasing of Question 2 also violates the rules of this Court. It is improper because it asks the Supreme Court to decide a cosmogonic matter: Is the Court of Appeals correct in affirming the District Court? Rule 14.1(a) of the Supreme Court requires that the question should be expressed "in relation to the circumstances of the case." Respondents' rephrased Question 2 is shapeless and in violation of Rule 14.1(a) because it has failed to specify the circumstance.

Petitioner respectfully submits that this Court consider the two questions as phrased by Petitioner, and reject the Respondents' inappropriate rephrasing of them.

B. The Seventh Circuit is Repeatedly in Conflict with This Court's Holding in *Price Waterhouse* and with Several Other Circuits

A mere two months after its decision of the present case, the Seventh Circuit again held, in *Brewer v. Board of Trustees of the University of Illinois*, 479 F3d 908 (7th Cir. 2007), that a higher-ranking manager's subsequent review of an adverse employment recommendation made by a culpable unit manager is by itself sufficient to insulate any illicit animus manifested by the recommending unit manager. *Brewer* involved the same defendants as this case.

In *Brewer*, Brewer's immediate supervisor, Thompson, made the recommendation to fire Brewer allegedly on account of his race. The Seventh Circuit, in affirming the summary judgment, held that the racial animus on the part of Thompson was immaterial because the final decision was made by a higher ranking officer, Hendricks, who reviewed and approved the termination recommendation forwarded by Thompson. The Seventh Circuit concluded: "Though Thompson, as Hendricks' assistant, might have effective control over some of Hendricks' decisions, the decision to fire Brewer was not one of them. Hendricks listened to the information Thompson relayed to her but did not simply rely on it." *Brewer v. Board of Trustees*, 479 F3d 908 (7th Cir. 2007).

Respondents concede in their Brief that the Seventh Circuit did not even make a reference to this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), a case Petitioner relied on heavily in the lower courts. In *Price Waterhouse* this Court found that the partners of the employer, though outside the decision-making chain, influenced the final decision through their comments forwarded to the final decision-maker, because "[a] negative comment, even when made in the context of a generally

favorable review, nevertheless may influence the decision-maker to think less highly of the candidate." (490 U.S. at 257, 109 S. Ct. at 1794, 104 L. Ed. 2d 268.)

Had the Seventh Circuit complied with this Court's holding in *Price Waterhouse*, it would have no choice but to conclude that Weaver's recommendation to Herman to terminate Petitioner is a motivating factor in Herman's titular decision to fire Petitioner, just as Thompson's recommendation to fire Brewer was a factor that motivated Hendricks to fire Brewer in *Brewer*. The Seventh Circuit's repeated use of higher-level review of adverse employment recommendations put in motion by culpable unit-level managers to insulate the illicit animus is in clear conflict with *Price Waterhouse*.

In their Brief in Opposition to Petition, Respondents forthrightly endorsed the lax standard used by the Seventh Circuit for insulating a unit manager's illicit animus, similarly as they (also as defendants) argued in the case of *Brewer*. If left uncorrected, such standard would mean that plaintiff employees in a multi-decision-maker employer, such as Brewer, Petitioner and numerous others, could not prevail in an employment decision unless there is evidence of illicit animus at all the decision-making levels. An employee ploughing at the unit level of a large employer, such as Petitioner and Brewer, commonly do not even interact with the titular higher-ranking decision-maker – how could there be evidence that the titular decision-maker also harbors an illicit animus directed at the impacted employee?

The Seventh Circuit's holding in this case and again in *Brewer* does not conform with the language in Section 703 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m) which provides:

"... an unlawful employment practice is

> established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Should the unit manger's termination recommendation (Thompson's in *Brewer* and Weaver's in the present case) be considered a motivating factor in the final decision made by the higher-ranking manager (Hendricks in *Brewer* and Herman in this case)? The Seventh Circuit, together with the Fourth and Eleventh Circuits, held that the review of the recommendation conducted by the higher ranking official is sufficient to insulate the illicit animus of the recommending manager from the final decision. (See *Brewer v. Board of Trustees,* 479 F3d 908 (7th Cir. 2007); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998); *Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001).) These and other decisions like them place these circuits squarely in conflict with the Second, Third and Ninth Circuits where the mere influence of the recommending manager over the final decision is sufficient for imputing to the employer the illicit animus manifested by the recommending manager. (See *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000); *Roebuck v. Drexel University*, 852 F.2d 715, 727 (3d. Cir. 1988); *Lam v. University of Hawaii*, 164 F.3d 1186, 1188 (9th Cir. 1999).)

The standard used by the Seventh Circuit is erroneous because it ignores the momentum carried by the initial recommendation, disregards the degree of autonomy given to the units within a hierarchical employer, and neglects the organizational loyalty among the managers within the same employer.

Petitioner respectfully submits that the use of internal managerial reviews for insulating the illicit animus of a recommending manager from the final decision, as in the Fourth, Seventh and Eleventh Circuits, is in conflict with this Court's holding in *Price Waterhouse* and with the language "a motivating factor" that the Congress introduced for proving illegal employment discrimination in Section 703 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(m).

C. The Seventh Circuit Rewrote and Relaxed Discovery Sanction Rules in Contradiction to This Court's Holding in *National Hockey League*

In their Brief in Opposition to Petition, Respondents did not dispute that they did violate, repeatedly, court's discovery orders. They did not dispute that it was these violations, nothing else, that led to the entry of default against them. They further did not dispute that there was no good cause or a valid excuse for the violations. Respondents' only argument in opposing the petition is that their violations were so minor that the default judgment rendered as a result may be vacated without a showing of a good cause. (Pages 3 and 12, Respondents' Brief.)

In a game of tennis, an umpire makes an out call when he sees the ball falling outside the border of the tennis court irrespective of whether it is out by an inch or by a yard. Fair play demands that players play within the space delineated by the rules. In civil litigation, this space is delineated by the Rules of Civil Procedures. Rules that permit sanctions must be enforced with rigor, particularly those governing discovery when the facts underlying the merits are necessarily not yet fully before the court. When a discovery sanction ruling has been made pursuant to the Rules, to vacate it there must be good cause. The violator bears the burden of showing a good cause or a valid excuse for the violations.

In this case, the umpire - the District Court - made the call of default after careful deliberations and progressive sanctions: He first gave the Respondents repeated and unambiguous warnings coupled with monetary sanctions (Pet. A5); he then provided Respondents with detailed reasons and cited case-law for entering the default after the Respondents committed repeated violations (Pet. A7); he further gave the Respondents two opportunities to object to his call (Pet. A3,4). He then made the ruling of default judgment after these deliberations led him to conclude that the Respondents had, in violating his orders, "displayed willfulness, bad faith or fault." (Pet. A8.)

And yet the Seventh Circuit held that the District Court acted "improvidently" in entering the default against the Respondents. (Pet. A95.) In so doing, the Seventh Circuit rewrote and relaxed the discovery sanction rule set by the Supreme Court and by the Rules of Civil Procedures.

In *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976), this Court had articulated the seriousness of discovery violations justifying the entry of default or dismissal as a sanction: a single violation of a discovery order was serious enough to warrant the entry of such sanctions. Until the instant case, such was the standard adopted by the Circuit Courts of Appeals; see *Forsythe v. Hales,* 255 F.3d 487, 490-491 (8th Cir. 2001); *Williams v. Chicago Board of Education* 155 F.3d 853, 858 (7th Cir. 1998); *In re: Thomas Consolidated Industries, Inc.*, 456 F.3d 719 (7th Cir. 2006). The Seventh Circuit's holding in this case that the entry of default against the Respondents for repeatedly violating discovery orders was so harsh that it may be vacated without a showing of good cause is clearly in conflict with *National Hockey League* and other circuits.

What the Respondents asked for, and the Seventh Circuit

held, was to rewrite and relax the discovery sanction rules after Respondents had been found in violation of them. The Seventh Circuit not only acted in conflict with this Court's holding in *National Hockey League*, it further substituted its ruling for that of the District Court by applying the relaxed rule to a bygone violation.

Conclusion

The petition for writ of certiorari should be granted as to both of the questions as presented by Petitioner.

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